Supreme Court, U.S.
FILED
04 292 AUG 26 2004
OFFICE OF THE CLERK

No. (2)

In The

Supreme Court of the United States

ICE EMBASSY, INC., *et al.*,

Petitioners,

vs.

CITY OF HOUSTON, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI, VOLUME II, Pages 63 to 299

JOHN H. WESTON*
G. RANDALL GARROU
CATHY E. CROSSON
JEFFREY F. ALLEN
WESTON, GARROU & DEWITT
12121 Wilshire Blvd., Suite 900
Los Angeles, California 90025
(310) 442-0072

Attorneys for Petitioners

**Counsel of Record*

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

APPENDICES

VOLUME I

Appendix A — Fifth Circuit Court of Appeals Opinion (November 25, 2003).....App. 1

VOLUME II

Appendix B — District Court Amended Memorandum Opinion and Order of June 9, 1998 [Amending Opinion of February 18, 1998] .....App. 63

VOLUME III

Appendix C — District Court Supplemental Memorandum Opinion And Order of June 11, 1998 [Initial Decision on Reconsideration] .....App. 300

Appendix D — District Court Memorandum Opinion And Order Regarding Conspicuous Display Requirement of August 3, 1998 [Additional Supplemental Opinion on Reconsideration] .....App. 432

Appendix E — Fifth Circuit Opinion on Rehearing (May 28, 2004) .....App. 445

Appendix F — Houston Ordinance No. 97-75 .....App. 455

Appendix G — Houston Ordinance No. 86-323 .....App. 491

Appendix H — District Court's Order Of Severance of August 28, 1998 .....App. 508

Appendix I — District Court's order of Final Judgment of August 31, 1998.....App. 509

APPENDIX B

27 F.Supp.2d 754

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

N.W. ENTERPRISES, INC., et al.,	§	
Plaintiffs,	§	CIVIL ACTION NO.
v.	§	H-97-0196
THE CITY OF HOUSTON,	§	
Defendant.	§	

AMENDED MEMORANDUM OPINION AND ORDER

(Filed Jun. 9, 1998)

TABLE OF CONTENTS

I. *INTRODUCTION* ..... [68]

A. *Procedural History* ..... [69]

B. *History of the Ordinance* ..... [75]

II. *SUMMARY JUDGMENT STANDARD* ..... [81]

III. *LEGAL STANDARD FOR FIRST AMENDMENT CHALLENGE* ..... [83]

A. *Business Entitled to Heightened First Amendment Scrutiny* ..... [84]

1. Content-Based Regulations Receive Strict Scrutiny ..... [85]

2. Content-Neutral Regulations Receive Intermediate Scrutiny ..... [86]

3. Distinguishing Content-Based from Content-Neutral Regulations..... [90]

4. The Relevance of *Turner Broadcasting System v. F.C.C.* ..... [97]

B. *Businesses Not Entitled to Heightened First Amendment Scrutiny Receive Rational Basis Review for All Provisions of the Ordinance* ..... [101]

C. *Can the Ordinance's Validity Be Determined Through Summary Judgment?*..... [105]

1. In General ..... [105]

2. Chil Soung's § 1983 and § 1985 Claims ..... [109]

3. Other Issues Plaintiffs Claim Have Not Been Addressed by the City's Summary Judgment Motion ..... [112]

IV. *GENERAL OBJECTIONS TO THE CITY'S EVIDENCE* ..... [113]

V. *OBJECTIONS TO SPECIFIC PROVISIONS OF THE ORDINANCE* ..... [117]

A. *Coverage of the Ordinance* ..... [117]

1. Vagueness ..... [117]

2. Overbreadth ..... [122]

3. Enterprises Containing Coin-Operated Machines ..... [124]

4. Extension of Ordinance's Coverage to Adult Mini-Theatres ..... [127]

B. *Locational Restrictions* ..... [130]

1. Abstention Question ..... [132]

2. Local and State Statutory Arguments... [136]

a. Zoning and the Houston City Charter ..... [136]

b. Locational Restrictions on Enterprises Containing Coin-Operated Machines ..... [145]

3. First Amendment Challenge ..... [149]

a. Increased Distance Requirements:

The New 1,500 Foot Rules ..... [150]

i. Content-Based or Content-Neutral? ..... [150]

ii. Conclusion as to Validity of Increased Distance Requirements for Protected Businesses ..... [181]

b. Public Parks ..... [183]

i. Content-Based or Content-Neutral? ..... [183]

ii. Narrowly Tailored to Serve Substantial Governmental Interests? ..... [185]

iii. Alternative Avenues of Communication ..... [185]

iv. Conclusion as to Validity of New Provision Regarding Public Parks ..... [186]

c. Multifamily Dwellings ..... [187]

i. Content-Based or Content-Neutral? ..... [187]

ii. Narrowly Tailored to Serve Substantial Governmental Interests? ..... [188]

iii. Alternative Avenues of Communication ..... [188]

iv. Conclusion as to Validity of New Formula Regarding Multifamily Dwellings ..... [190]

C. *Amortization* ..... [191]

1. Guidelines for Providing Amortization Extensions ..... [194]

2. Time Limits on Amortization Decisionmaker ..... [198]

3. Adequacy of Amortization ..... [200]

4. Amortization for Adult Arcades and Mini-Theatres ..... [202]

5. Amortization for Plaintiffs in *4330 Richmond* ..... [203]

6. Measure of Compensation ..... [204]

7. Length of Amortization Period ..... [206]

D. *Notice Provision* ..... [206]

E. *Structural, Visibility, and Lighting Requirements* ..... [208]

1. Permissibility of Non-Locational Regulation of Sexually Oriented Businesses Under Texas State Law ..... [208]

2. What These New Requirements Prohibit ..... [210]

3. Legislative Justification for These Requirements ..... [214]

4. Patrons' Right to Privacy ..... [217]

5. Economic Harm to Plaintiffs ..... [220]

F. *Signage and Exterior Portions Restrictions* ..... [222]

1. The Restrictions ..... [222]
2. The Continued Applicability of *SDJ* ... [230]
3. Extension of Signage Restrictions to Enterprises in Multi-Unit Centers ..... [233]
4. State Law Requirements for Revising Signage Restrictions ..... [236]

G. *Entertainer and Manager Permit Requirement* ..... [238]

1. Permissibility of Individual Permit Requirement ..... [243]
2. Content-Based or Content-Neutral? ... [246]
3. Narrowly Tailored to Serve Substantial Governmental Interests? ..... [248]
4. Public Disclosure of Permit Application Information Under Texas Public Information Act ..... [252]
5. Prior Restraint ..... [257]
   a. Procedural Safeguards ..... [257]
      i. Application Processing Period ..... [259]
      ii. Prompt Judicial Review ..... [263]
      iii. Burden on City to Justify Permit Denials in Court ..... [265]
   b. Criminal Background Check ..... [266]
   c. Texas Constitution ..... [267]
6. "As Applied" Challenge ..... [269]
7. Conspicuous Display Requirement ..... [270]

H. *No-Touch and Three-Foot Rules* ..... [274]

1. Content-Based or Content-Neutral? ... [275]

a. Legislative Justification for these Requirements ... [275]

b. Economic Impact ... [278]

2. Narrowly Tailored to Serve Substantial Governmental Interests? ... [283]

3. Interference With Expressive Content ... [286]

4. Vagueness and Arbitrary Enforcement ... [289]

5. Texas Constitution ... [290]

VI. *CONCLUSION* ... [292]

AMENDED MEMORANDUM OPINION AND ORDER

I. *INTRODUCTION*

One hundred five individuals and eighty-eight Houston-area adult entertainment establishments – cabarets, movie theatres, arcades, mini-theatres, video stores, bookstores, modeling studios, and tanning salons – have brought this action challenging the City of Houston's most recent amendments to its sexually oriented business regulatory ordinance. Plaintiffs attack Ordinance 97-75 (hereinafter "Ordinance"), enacted on January 15, 1997, primarily on the ground that it violates the First Amendment to the United States Constitution, but also on other federal and state constitutional, as well as federal, state, and local statutory grounds. Pending before the Court are numerous motions for summary judgment filed by Defendant City of Houston and all Plaintiffs. These motions, which are described in more detail below, are granted in part and denied in part.

A. *Procedural History*

During a pretrial conference held on June 12, 1997, the parties agreed that this case would proceed most efficiently if the Court would first consider all legal issues not requiring extensive factual development through discovery. At that conference, the City of Houston agreed not to enforce the Ordinance during a designated period in which the Court would consider whether all or part of this challenge could be resolved through legal briefs and documentary evidence without a trial.[1] At the Court's direction, the parties have submitted extensive briefing on the legality of various provisions of the Ordinance. Limited discovery was permitted on various issues.

The City of Houston has filed a "comprehensive" Motion for Summary Judgment,[2] in which it argues that the entire Ordinance is valid as a matter of law and that no genuine issues of material fact exist which require a trial in this case. In accordance with the previously entered scheduling orders, Plaintiffs have filed two sets of responses, the first set addressing all issues other than the Ordinance's new locational restrictions on sexually oriented businesses and the second set addressing the locational restrictions.[3] Plaintiffs, who include the original

---

[1] At a later conference held on October 17, 1997, the City agreed to extend the standstill while the Court considered the City's pending summary judgment motion and Plaintiffs' cross-motions for summary judgment, which were filed shortly after the conference.

[2] Throughout this Opinion, unless otherwise specified, the City's "Motion" refers to the City's Amended Motion for Summary Judgment [Doc. # 120], which was filed on June 30, 1997.

[3] Throughout this Opinion, Plaintiffs' first set of responses will be referred to simply as "responses," and Plaintiffs' second set of responses will be referred to as "locational responses." The Dee & Dee Plaintiffs'

(Continued on following page)

plaintiffs in this action as well as numerous intervenors who joined later in the litigation, are divided into the following nine groups, each of which is represented by a different set of attorneys and has filed separate briefs: N.W. Enterprises[4]; FTU[5]; Dee & Dee Enterprises[6]; A.H.D.[7];

---

attorneys claim to have experienced computer problems which delayed their filing of their Locational Response [Doc. # 214]. The City did not object to this late filing and does not appear to have suffered any prejudice as a result. Dee & Dee's Motion to File Two Hours Late [Doc. # 213] is therefore **GRANTED**.

[4] The "N.W. Enterprises" Plaintiffs, who were the original plaintiffs in this action, include N.W. Enterprises, Inc.; Amethyst Enterprises, Inc.; Campus Investments, Inc.; 1431 West 18th, Inc.; Vista Video Corporation; Douglas Skyock; and John Doe.

[5] The "FTU" Plaintiffs include FTU, Inc.; Dajo, Inc.; Ice Embassy, Inc.; Texas Richmond Corp.; Andrea Stafford; Andrea Allbright Marco; Naomi L. Parrish; Ann Marie Hasselbach; Jeanne L. Grigsby; Susan Boyle; Dana Lynn Thomas; Kimberly Ann Dushman; Michelle Hadley; Colleen Cloer; Leah Marie Wilson; Carla K. Eaton; Andrea Hill; Gina Oliver; Heather Weldin; Charisma Barry; Donna Soto; Cheryl Thompson; Robert G. Furey; Eric Rubenstein; and Frank I. Kent. It also appears that Jeana Wiley and Southeastern Management, Inc. d/b/a Northshore Video and News later joined the FTU Plaintiffs.

[6] The "Dee & Dee" Plaintiffs include Dee & Dee Enterprises, Inc.; 9924 I-45 North, Inc.; Hi-Houston, Inc.; and Charles Wesley, Inc.

[7] The "A.H.D." Plaintiffs include A.H.D. Houston, Inc. d/b/a Centerfolds; D.N.W. Houston, Inc. d/b/a Gold Cup; Parabar Co. d/b/a Paradise; Jane Doe One; and Jane Doe Two.

The City has filed a Motion to Strike Jane Doe Plaintiffs [Doc. # 229], arguing that these Plaintiffs should not be allowed to proceed without revealing their identities to the City and to the Court. The A.H.D. Plaintiffs contend that Fifth Circuit authority allows parties to challenge governmental action anonymously in cases in which the plaintiffs have a compelling need to protect their privacy. *See Doe v. Stegall,* 653 F.2d 180, 185 (5th Cir.1981); *Southern Methodist University Ass'n of Women Law Students v. Wynne & Jaffe,* 599 F.2d 707, 712-13 (5th Cir.1979). The City argues, however, that even in these two cases, the plaintiffs revealed their identities to the opposing parties for the purposes of discovery and so that the opposing parties could challenge

(Continued on following page)

Marketing Organization[8] ; Mark Thai Do[9]; Elgin Investment[10]; Chil Soung[11]; and KQ Investments.[12]

---

their standing. While the Court generally agrees with the City that the "Jane Doe" Plaintiffs' identities should be disclosed if open-ended discovery occurs, their identities are not material at this time. Thus, the Court does not find these reasons for disclosure applicable. In the case at bar, discovery has been stayed, the Court is primarily addressing facial constitutional challenges, and there are many other entertainers who are named plaintiffs in this action and thus clearly have standing to challenge the Ordinance's provisions that affect individual entertainers. There is therefore no reason for the City to challenge the standing of these two unnamed plaintiffs. The Court **DENIES** the City's Motion to Strike Jane Doe Plaintiffs [Doc. # 229].

[8] The "Marketing Organization" Plaintiffs include Marketing Organization of America, Inc.; Budget Distributors, Inc. d/b/a Franc's of Beverly Hills; Michael D's Restaurant, Inc. d/b/a Houston Salon and Fitness Center d/b/a Texas Health Salon; Le Crazyhorse Cabaret Astrodome, Inc. d/b/a Malibu Resorts d/b/a Sensational Impressions; EPZ Trading Company d/b/a Texas Health Salon; Deux Soeur Enterprises, Inc. d/b/a Native T.A.N.; Limerick, Inc. d/b/a Video Specials; and Your A to X Video Outlet, Inc.

[9] The "Mark Thai Do" Plaintiffs include Mark Thai Do d/b/a Dong Kyong Modeling Studio and Norman S. Harrison.

[10] The "Elgin Investment" Plaintiff includes Elgin Investment Company, Ltd. d/b/a French Quarter Theater.

[11] The "Chil Soung" Plaintiffs include Chil Soung, Inc. d/b/a BJ's 24 Hour Newstand; Daris, Inc. d/b/a Riveria Cabaret; GNCD, Inc. d/b/a Fantasy South; Rude Dog II, Inc. d/b/a Scores Cabaret; Lone Start Multi Theatres, Inc. d/b/a Cinema West; AVW, Inc. d/b/a Adult Video Megaplexxx; C.L.M.S., Inc. d/b/a 24 Hour Video & News; C-SNAP, Inc. d/b/a Interludes; East Bay, Inc. d/b/a East Tex 24 Hour News & Video d/b/a Hempstead Adult Bookstore d/b/a World News Stand d/b/a X.T.C. Cabaret Center; TNT Services, Inc. d/b/a Xcalibur; 9834 Jensen, Inc. d/b/a Harlem Knights; 8503 North Freeway, Inc. d/b/a Fantasy Cabaret; Corporate Clubs of Texas, Inc. d/b/a Fantasia I XTC; US Clubs, Inc. d/b/a Fantasia III XTC; Cabaret, Inc. d/b/a XTC; DHL, Inc. d/b/a Executive XTC; Cherie Feldman d/b/a Executive Playmates; Eve Enterprises, Inc. d/b/a Club Royale; Long Tran d/b/a Ellington Newstand; Nien X. Nguyen d/b/a DT Video; W.M.F. Investments, Inc. d/b/a Chesapeake Bay; A.K.M., Inc. d/b/a Gigi's Cabaret; DHR, Inc. d/b/a Hi-10

(Continued on following page)

Cabaret; Panah, Inc. d/b/a Mirage Cabaret; R & R Entertainment, Inc. d/b/a Moments Cabaret; S.S.D. Enterprises, Inc. d/b/a Ritz Cabaret; H.H.E., Inc. d/b/a Passion Cabaret; F & R Club, Inc. d/b/a Silk Bar & Grill Cabaret; Atcomm Services, Inc. d/b/a Broadstreets; Houman Shaghai d/b/a Foxxy's Cabaret; Southeast Texas Ventures, a Texas Joint Venture d/b/a The Tropy Club; KMRC, Inc. d/b/a LaChatte; Aris Mylonas d/b/a Baby Dolls Saloon; M.K. Club & Restaurants, Inc. d/b/a Moulin Rouge; 10128 TDC 1, Inc. d/b/a Texas Dolls Cabaret; Southwest Clubco, Inc. d/b/a Playmates; Duncan Burch, Inc. d/b/a Michael's International; Obession Cabaret, Inc. d/b/a Obsession Cabaret; Norman R. Glenn d/b/a West Mt. Houston Newsstand d/b/a Far West News d/b/a Highway 6 Newsstand; James Drew d/b/a Gold Touch Stress Clinic and Velvet Touch Stress Clinic; Pete Caserly d/b/a Northwest News; A to X Video d/b/a Pacific Management Enterprises; Hughes & St. Clair, Inc. d/b/a Pacific Management Enterprises; Quasar International, Inc. d/b/a Pacific Management Enterprises; Video News, Inc. d/b/a Pacific Management Enterprises; Chuck Wesley d/b/a Pacific Management Enterprises; Chuck Wesley, Inc. d/b/a Northwest News; Jacob Borenstein d/b/a Northwest News; 12851-59 Westheimer, Inc.; 608 West Mt. Houston, Inc.; Gino A. Barone d/b/a Ban Management Co. a/k/a Consolidated Video d/b/a Hillcroft News & Video d/b/a Telephone Road News & Video; Heaven Video & News; Airline Video and Thai Company; City Wide Group, Inc. d/b/a Studz News; A.N.S., Inc. d/b/a Lone Star News; Northstar, Inc. d/b/a North Freeway News; Northeast, Inc. d/b/a Gulf Freeway News; Eastex 24-Hour Newsstand; G.W. Rodgers; R. Glass; G. Humphrey; D.L. Stoneham; L.J. Putterman; M. Roberts; V.L. Auzston; J.J. Langan; H. Perez; A. Lucke; Y. Hinojosa; A.N. McMillen; B. Webb; R. Sternes; S. Mongonia; K. Martin; N. Roberts; V. Gobea; D. Quick; K. Warren; R. Sanchez; S. Jurek; N. Espinosa; C. Emery; K. Martin; C. Combs; J. Dampier; W. Kalinowski; J. Crenshaw; L.M. Bates; H. MacTavish; T. Dove; E. Castillo; K.K. Hannan; C.J. Sharpe; A. Cook; N. Bailey; T.R. King; L.B. Meagher; N. Henry; A. Bailey; D. Dodson; J. Suarez; A.N. McMillan; K. Rosenberry; C. Garcia; M. Fisher; D.M. Muenzler; T.J. Oakley; D. Carswell; A. Kelly; T. Western; K.A. Rader; L. Phillips; T. Jones; A. Gibson; G. Pierce; N. Neuenfeldt; T. Allen; S.L. Whittenburg; P.A. Buffin; C. Vaughn; T.L. Aldape; S.Y. Noreno; L. Tauarez; T. Dardas; N. Barry; T. Standride; J.D. Burden; S.S. Salazar; H.L. Lococo; S. Brady; S. Nnoli; E.I. Street; D. Jorgenson; D.G. Lewis; P.Z. German; J.M. Rogers, Jr.; B. Templemire, Jr.; R. Duncan; J. Easterwood; J.C. Acres; N. Templemire; Trumps, Inc. d/b/a Rick's Cabaret; and Andrew Sefia d/b/a Rumors.

(Continued on following page)

In their original responses, most Plaintiffs primarily argued that numerous factual issues preclude resolution of this case through summary judgment on the current record. However, two sets of Plaintiffs, the A.H.D. and the FTU Plaintiffs, also filed cross-motions for summary judgment with their original responses, contending that the Court could *invalidate* the Ordinance in whole or in

---

In addition, the "Chil Soung" Plaintiffs originally indicated in the caption of their case style heading that they include "others similarly situated." The City of Houston filed a Motion to Strike this language [Doc. # 233], since Plaintiffs have not sought to certify this case as a class action. In response, the Chil Soung Plaintiffs consented to strike the language "and others similarly situated" from their case style heading. The City's Motion to Strike [Doc. # 233] is therefore **GRANTED**.

[12] The "KQ Investments" Plaintiff, which includes KQ Investments, Inc. d/b/a Amenity Cabaret, filed a Motion to Intervene [Doc. # 280] on October 24, 1997. The City has objected to this intervention [Doc. # 320] on the ground that it is untimely and will delay the resolution of this case. Although the parties agreed at the conference held on May 12, 1997, that the deadline for intervention would be May 30, 1997, the Court finds that the intervention of this one additional party will not delay the proceedings or impose an undue burden on the City. Therefore, KQ Investments' Motion to Intervene [Doc. # 280] is **GRANTED**. However, this Plaintiff is subject to the same scheduling deadlines as the other parties and is bound by this Opinion. The City has informed the Court, and KQ Investments has not denied, that KQ Investments has been aware of this federal suit since before the deadline for intervention, specifically decided at an earlier time not to join this suit, but apparently changed its mind on this issue. Thus, since KQ Investments is voluntarily joining this litigation late, it cannot claim that it will suffer any prejudice by the existing deadlines and briefing. The Court notes further that most of the Plaintiffs in this suit have not submitted independent briefing; they instead have relied on the briefing filed by other Plaintiffs.

Finally, it is unclear from the pleadings to which group of plaintiffs D.S.S.S. Aria Merica, Inc. d/b/a Solid Platinum belongs. This Plaintiff's claims are addressed through the rulings stated herein.

part as a matter of law.[13] In order to expedite its consideration of the legal issues presented in this case, the Court ordered at the pretrial conference held on October 17, 1997, that any other Plaintiffs who believe summary judgment in their favor is appropriate in whole or in part should promptly submit cross-motions for summary judgment. All the remaining Plaintiffs submitted such cross-motions.[14]

The City has filed a reply to each response as well as responses to the cross-motions. Plaintiffs have filed replies to the City's responses. Except as noted where relevant, Plaintiffs have generally incorporated all of one another's responses and arguments challenging the Ordinance.[15]

---

[13] In their original response and cross-motion [Doc. # 173], the A.H.D. Plaintiffs sought summary judgment invalidating the entire Ordinance, whereas the FTU Plaintiffs sought summary judgment on only discrete, specified issues [Doc. # 170]. The FTU Plaintiffs, as well as the N.W. Enterprises Plaintiffs, strenuously argued that many of the issues presented here are factual and urged that, pursuant to Fed.R.Civ.P. 56(f), they be given the opportunity for further discovery in order to present evidence demonstrating the existence of material questions of genuine fact. *See, e.g.*, FTU's Response [Doc. # 170], at 53-56; FTU's Locational Response [Doc. # 221], at 14-18; N.W. Enterprises' Response [Doc. # 151], at 26.

[14] In addition, the FTU Plaintiffs submitted a Supplemental Cross-Motion [Doc. # 270], in which they revised their earlier indication that they were seeking summary judgment only on several discrete issues. The FTU Plaintiffs now seek summary judgment on all issues which they have briefed. They continue to contend, however, that neither they nor the City has moved for summary judgment on six of their causes of action.

[15] Throughout this Opinion, the Court will occasionally specify which groups of Plaintiffs have raised various arguments and will cite portions of specific briefs. These designations are for the convenience of the parties only in locating generally where particular arguments are addressed. Because many Plaintiffs have raised overlapping or similar

(Continued on following page)

In addition to these motions and cross-motions for summary judgment, the parties have raised numerous objections to each other's proffered evidence and have filed motions to strike various briefs and exhibits. The Court will address these motions below where relevant.

After detailed consideration of the parties' briefs, exhibits, all other matters of record in this case, and the relevant authorities, the Court concludes that Ordinance 97-75 is valid and enforceable except in several respects discussed below and that no parties have yet raised any material issues of genuine fact necessitating resolution through a trial. Thus, the City's Motion for Summary Judgment [Doc. # 120] is **GRANTED IN PART** and **DENIED IN PART**, and Plaintiffs' Cross-Motions for Summary Judgment [Docs. # 170, 173, 218, 221, 258, 268, 270, 289, and 290] are **GRANTED IN PART** and **DENIED IN PART** in accordance with this Opinion.

B. *History of the Ordinance*

An understanding of Plaintiffs' challenge to Ordinance 97-75 requires a brief recounting of the history of Houston's regulation of sexually oriented businesses, which are also referred to by the parties and the Court as "adult businesses."

The first attempt, brought to this Court's attention, by the City of Houston to regulate sexually oriented businesses was in 1977, before the development of most of the

---

arguments, these designations do not purport to indicate that *only* the specified Plaintiffs mentioned a particular argument in their briefing or that the argument is only addressed on the pages cited.

current First Amendment law on the subject of adult entertainment. Ordinances 77-1259 and 77-1260 prohibited the operation of adult commercial establishments within two thousand feet of any church, school, or other educational or charitable institution. A federal district court declared these ordinances unconstitutional on the grounds that they were vague and overbroad, violated the First and Fourteenth Amendments, and denied the adult businesses due process and equal protection. *See Universal Amusement Co., Inc. v. Hofheinz,* 616 F.2d 202, 204 (5th Cir.1980).[16]

In 1983, the City again attempted to regulate sexually oriented businesses by enacting the first version of its current ordinance. Ordinance 83-1812, Exhibit A to the City's Motion [Doc. # 120], prohibited such businesses as adult cabarets, adult modeling studios, and adult encounter parlors from operating within 750 feet of any "school or church or place of worship," within 1,000 feet of any other sexually oriented business, or on any tract of land for which 75% or more of the tracts within a 1,000 foot radius were residential. The ordinance also placed severe restrictions on the businesses' exterior decor and signage. Due to then existing state law restrictions on municipal regulatory power, that ordinance did not apply to adult bookstores, movie theatres, or cabarets that were licensed by the state to sell alcoholic beverages.

In 1985, the City enacted Ordinance 85-1337, Exhibit B to the City's Motion [Doc. # 120], which imposed restrictions

---

[16] The district court's opinion was not published, and the Fifth Circuit did not review the merits of the district court's constitutional ruling.

on adult arcades, including requirements that adult arcades maintain visible interiors, managers' stations, and minimal levels of lighting.[17] This ordinance was upheld against constitutional attack in *Rahmani v. State,* 748 S.W.2d 618 (Tex.App. – Houston [1st Dist.] 1988, pet. ref'd), *cert. denied,* 490 U.S. 1081, 109 S.Ct. 2102, 104 L.Ed.2d 663 (1989).

In response to a 1985 change in state law permitting cities to regulate adult businesses licensed by the state to serve alcoholic beverages,[18] the City enacted another ordinance in 1986 to extend the locational and other restrictions of the 1983 ordinance to adult lounges, ("topless clubs").[19] *See* Ordinance 86-323, Exhibit C to the City's Motion [Doc. # 120]. The 1986 Ordinance also added licensed daycare centers to the list of protected land uses from which the businesses could not operate within 750 feet. At least twenty-three topless clubs that were forced to close or relocate as a result of this ordinance brought a federal lawsuit seeking to enjoin its enforcement. In *SDJ, Inc. v. City of Houston,* 636 F.Supp. 1359 (S.D.Tex.1986) (McDonald, J.), the district court upheld this ordinance against various constitutional and other legal challenges,

---

[17] "Adult arcades" are establishments containing "coin-or slug-operated or electronically or mechanically controlled machine[s] or device [s]" that dispense adult entertainment intended for viewing by five or fewer persons. HOUSTON, TEX., CODE OF ORDINANCES § 28-81. Unless otherwise indicated, all further references to section numbers beginning with 28 refer to Chapter 28 of the Houston, Tex., Code of Ordinances, which is the chapter pertaining to sexually oriented businesses.

[18] *See* Tex. Loc. Gov't Code § 243.005 (previously codified at Tex.Rev.Civ.Stat. art. 2372w).

[19] "Adult lounges" are adult cabarets that are licensed by the state to serve alcoholic beverages. *See* § 28-121.

with the exception of several minor provisions.[20] On appeal, the Fifth Circuit affirmed the district court. *See SDJ, Inc. v. City of Houston,* 837 F.2d 1268 (5th Cir.1988), *cert. denied sub nom. M.E.F. Enterprises, Inc. v. City of Houston,* 489 U.S. 1052, 109 S.Ct. 1310, 103 L.Ed.2d 579 (1989).

In response to a 1989 change in state law permitting cities to regulate adult bookstores and movie theatres,[21] the City enacted Ordinance 91-187, Exhibit D to the City's Motion [Doc. # 120], which expanded the scope of the previous ordinances to cover adult bookstores and adult movie theatres. A number of affected businesses brought a constitutional challenge against this ordinance in federal court. In *4330 Richmond Ave. et al. v. City of Houston,* No. 91-0665 (S.D.Tex. July 11, 1997) (Rainey, J.), the district court upheld Ordinance 91-187 except in two minor respects.[22] That case is currently on appeal to the Fifth Circuit.

---

[20] The district court struck down a provision that required operators of sexually oriented businesses to furnish lists for the City of all employees or contractors who provided services for the businesses; a provision that required disclosure of the operators' aliases; and a provision requiring operators to have "fully complied with all state, federal and local laws or regulations affecting the conduct of [their] business[es]" before receiving a permit. *See SDJ,* 636 F.Supp. at 1371-72. The City later amended the ordinance to delete these provisions.

[21] *See* Tex.Loc. Gov't Code § 243.002 (previously codified at Tex.Rev.Civ.Stat. art. 2372w).

[22] The court found unconstitutional a provision that did not provide for judicial review of the City's decision to suspend a sexually oriented business permit and the City's requirement that sexually oriented business operators deliver their permit applications in person to the Vice Squad.

On January 15, 1997, the City enacted Ordinance 97-75, the subject of the current lawsuit. This Ordinance increases the locational restrictions on all sexually oriented businesses, expands the scope of regulation to cover "adult mini-theatres,"[23] imposes new structural requirements on sexually oriented businesses, expands the reach of signage restrictions, and adds new regulations affecting individuals working in sexually oriented businesses. The new locational restrictions imposed by Ordinance 97-75 include an increase in the minimum distance between sexually oriented businesses and protected land uses from 750 feet to 1,500 feet[24]; the addition of "public parks" to the list of protected land uses[25]; an increase from 1,000 to 1,500 feet in the radius for calculating whether 75% or more of surrounding tracts are residential in character[26]; and a revision in the method for calculating the percentage of residential tracts.[27] The Ordinance requires that applicants for licenses to open sexually oriented businesses publish newspaper notices warning the public of

---

[23] "Adult mini-theatres" are similar to "adult arcades," except that "adult mini-theatres" contain machines that dispense adult entertainment intended for viewing by more than five and fewer than one hundred persons. *See* § 28-81.

[24] *See* § 28-125(b)(1). The prior minimum distance, 750 feet, is roughly equivalent to the length of two football fields (including the end zones) placed end-to-end. Thus, the City has attempted to double the minimum distance between sexually oriented businesses and protected land uses from two football field lengths to four football field lengths.

[25] *See id.*

[26] *See* § 28-125(b)(3).

[27] Under the previous versions of the Ordinance, a tract of land occupied by a "multifamily" structure was counted as a single residential tract. However, under Ordinance 97-75, "multifamily" tracts are counted as multiple residential tracts, for which each one-eighth acre of land is equivalent to one residential tract. *See id.*

their applications.[28] Also, the Ordinance requires adult mini-theatres and other sexually oriented businesses to conform to new structural, visibility, and lighting requirements. These provisions will require many businesses to remodel their interior spaces and eliminate doors and private rooms.[29] In addition, the adult arcades and mini-theatres must seal their interior walls to eliminate so-called "glory holes" through which patrons purportedly engage in anonymous sex.[30] The Ordinance extends the application of previous signage limitations to sexually oriented businesses located in multi-tenant complexes.[31] Ordinance 97-75 also requires managers and entertainers who work in sexually oriented businesses to obtain individual permits, for which they must divulge personal information and undergo criminal background checks,[32] and to wear personal identification cards at all times while they are working.[33] Finally, the Ordinance prohibits touching between entertainers and patrons [34] and requires

---

[28] *See* § 28-123(f).

[29] Section 28-101, which previously applied only to adult arcades and now applies to adult mini-theatres as well, requires that all interior areas of a business be visible from managers' stations. Section 28-103, which also previously applied only to adult arcades and now applies to adult mini-theatres as well, establishes minimum lighting requirements. Section 28-136, a new provision, establishes access, visibility, and lighting requirements for all other sexually oriented businesses.

[30] *See* § 28-102.

[31] *See* § 28-130(g).

[32] *See* §§ 28-253 and 28-254.

[33] *See* § 28-256.

[34] *See* § 28-258(a).

that entertainers, while working, stay at least three feet away from patrons.[35]

In this action, Plaintiffs challenge the validity of numerous provisions of Ordinance 97-75 on various federal, state, and local law grounds discussed below.

II. *SUMMARY JUDGMENT STANDARD*

In deciding a motion for summary judgment, the Court must determine whether "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no

---

[35] *See* § 28-258(b). Ordinance 97-75 consists of a preamble and twelve Sections. Section 1 adopts the preamble and legislative record for the Ordinance. Section 2 amends Article II of the Houston, Tex., Code of Ordinances; this article includes §§ 28-81 to 28-116 of the Code of Ordinances and applies only to adult arcades and adult mini-theatres. Section 3 amends Article III of the Code of Ordinances; this article includes §§ 28-121 to 28-136 of the Code of Ordinances and applies to *all* sexually oriented business enterprises, including adult arcades and mini-theatres. Section 4 creates a new article for the Code of Ordinances, Article VIII; this article includes §§ 28-251 to 28-259 of the Code of Ordinances and establishes conduct and permit requirements for individuals working in sexually oriented businesses. Section 5 amends the Code of Ordinances with a list of criminal offenses which may prevent individuals from obtaining permits under Article VIII. Section 6 provides for the posting of a pertinent section of the Code of Ordinances in state courthouses. Sections 7, 8, and 9 contain effective dates for various provisions of Ordinance 97-75, and Section 8 provides for certain extensions that may be obtained from these effective dates. Section 10 is a housekeeping provision describing the format used in Ordinance 97-75 to show which provisions are new and which provisions from the previous Ordinance are stricken. Section 11 contains a severability clause, indicating that if any portions of Ordinance 97-75 are held to be invalid, the City Council intends for the remaining valid sections to be severed. Finally, Section 12 provides that the Ordinance shall take effect immediately upon its passage.

genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c); *Celotex Corp. v. Catrett,* 477 U.S. 317, 322-23, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986); *Little v. Liquid Air Corp.,* 37 F.3d 1069, 1075 (5th Cir.1994) (en banc); *Boze v. Branstetter,* 912 F.2d 801, 804 (5th Cir.1990). The facts are to be reviewed with all inferences drawn in favor of the party opposing the motion. *See Boze,* 912 F.2d at 804 (citing *Reid v. State Farm Mut. Auto. Ins. Co.,* 784 F.2d 577, 578 (5th Cir.1986)). However, factual controversies are resolved in favor of the nonmovant "only when there is an actual controversy – that is, when both parties have submitted evidence of contradictory facts." *Laughlin v. Olszewski,* 102 F.3d 190, 193 (5th Cir.1996).[36]

The party moving for summary judgment has the initial burden of demonstrating the absence of a material fact issue with respect to those issues on which the movant bears the burden of proof at trial. If the movant meets this initial burden, the burden shifts to the nonmovant to demonstrate with "significant probative evidence" that there is an issue of material fact so as to warrant a trial. *See Texas Manufactured Hous. Ass'n v. Nederland,* 101 F.3d 1095, 1099 (5th Cir.1996), *cert. denied,* 521 U.S. 1112, 117 S.Ct. 2497, 138 L.Ed.2d 1003

---

[36] Under Fed.R.Civ.P. 56(f), nonmovants may instead seek continuance on the motion by submitting affidavits describing why they have not yet been able to obtain the requisite evidence. "A party seeking a continuance to conduct discovery must demonstrate 'both why it is currently unable to present evidence creating a genuine issue of fact and how a continuance would enable the party to present such evidence.'" *Haynsworth v. The Corporation,* 121 F.3d 956, 970 (5th Cir.1997) (quoting *Liquid Drill, Inc. v. U.S. Turnkey Exploration, Inc.,* 48 F.3d 927, 930 (5th Cir.1995)).

(1997); *Taylor v. Principal Fin. Group, Inc.*, 93 F.3d 155, 161 (5th Cir.), *cert. denied*, 519 U.S. 1029, 117 S.Ct. 586, 136 L.Ed.2d 515 (1996); *Transamerica Ins. Co. v. Avenell*, 66 F.3d 715, 718-19 (5th Cir.1995); *Forsyth v. Barr*, 19 F.3d 1527, 1533 (5th Cir.1994).

The nonmovant's burden may not be satisfied by conclusory allegations, unsubstantiated assertions, metaphysical doubt as to the facts, or a scintilla of evidence. *See Grimes v. Texas Dept. of Mental Health*, 102 F.3d 137, 139-40 (5th Cir.1996); *Little*, 37 F.3d at 1075. Rule 56 mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a sufficient showing of the existence of an element essential to the party's case, and on which that party will bear the burden at trial. *See Little*, 37 F.3d at 1075 (citing *Celotex*, 477 U.S. at 322, 106 S.Ct. 2548).

III. *LEGAL STANDARD FOR FIRST AMENDMENT CHALLENGE*

Plaintiffs primarily attack Ordinance 97-75 as an infringement upon their First Amendment right to free speech. In a series of cases, the Supreme Court has held that some types of adult entertainment qualify as constitutionally protected speech and have accordingly applied heightened scrutiny under the First Amendment to government restrictions on: nude dancing, *see Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 565-66, 111 S.Ct. 2456, 115 L.Ed.2d 504 (1991); *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 66, 101 S.Ct. 2176, 68 L.Ed.2d 671 (1981); adult bookstores and adult video stores, *see FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 110 S.Ct. 596, 107 L.Ed.2d 603 (1990); and adult movie theatres, *see City of Renton v.*

Playtime Theatres, Inc., 475 U.S. 41, 46-47, 106 S.Ct. 925, 89 L.Ed.2d 29 (1986); *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 69-70, 96 S.Ct. 2440, 49 L.Ed.2d 310 (1976). Under these cases, most, but not all, of the Plaintiffs in this action are entitled to receive the Court's heightened First Amendment scrutiny of various provisions of Ordinance 97-75.[37]

In sum, regulations that affect First Amendment interests and are content-based are evaluated under "strict scrutiny"; regulations that affect First Amendment interests but are content-neutral are evaluated under "intermediate scrutiny." *See City of Renton,* 475 U.S. at 46-47, 106 S.Ct. 925. To the extent that a regulation does not affect First Amendment or other constitutional interests and does not make distinctions on the basis of any protected classes, it is reviewed under the lowest level of constitutional scrutiny, the rational basis test. *See City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 441-42, 105 S.Ct. 3249, 87 L.Ed.2d 313 (1985); *Village of Belle Terre v. Boraas,* 416 U.S. 1, 7-8, 94 S.Ct. 1536, 39 L.Ed.2d 797 (1974); *SDJ,* 837 F.2d at 1273.

A. *Businesses Entitled to Heightened First Amendment Scrutiny*

In *City of Renton,* the Supreme Court upheld a local ordinance that restricted the permissible locations for constitutionally protected adult movie theatres[38] and

---

[37] *See infra* Section III.B. for a discussion of the Plaintiffs who are not entitled to this heightened scrutiny.

[38] Renton's ordinance prohibited adult movie theatres "from locating within 1,000 feet of any residential zone, single- or multiple-family

(Continued on following page)

described the contours of the applicable First Amendment test as follows:

> [R]egulations enacted for the purpose of restraining speech on the basis of its content presumptively violate the First Amendment. On the other hand, so-called "content-neutral" time, place, and manner regulations are acceptable so long as they are designed to serve a substantial governmental interest and do not unreasonably limit alternative avenues of communication.

475 U.S. at 46-47, 106 S.Ct. 925 (citations omitted). Under this test, a court must first consider whether a challenged time, place, and manner regulation[39] is content-based or content-neutral.

1. Content-Based Regulations Receive Strict Scrutiny

A regulation is "content-based" if it was intended to "suppress the expression of unpopular views," *id.* at 48, 106 S.Ct. 925, or if it "distinguish[es] favored speech from disfavored speech on the basis of the ideas or views expressed," *Turner Broadcasting System, Inc. v. FCC,* 512

---

dwelling, church or park, and within one mile of any school." *City of Renton,* 475 U.S. at 43, 106 S.Ct. 925.

[39] A regulation that establishes restrictions on adult businesses, such as minimum distances between adult businesses and protected land uses, but does not ban the businesses altogether, is a time, place, and manner regulation. *See City of Renton,* 475 U.S. at 46, 106 S.Ct. 925. Thus, because Ordinance 97-75 does not expressly ban any businesses altogether, its provisions may be characterized as time, place, and manner regulations. However, "[d]escribing the ordinance as a time, place, and manner regulation is, of course, only the first step in our inquiry." *Id.*

U.S. 622, 643, 114 S.Ct. 2445, 129 L.Ed.2d 497 (1994) (*Turner I*). If a court determines that a regulation is content-based, then that regulation must be subjected to strict scrutiny, is presumptively impermissible, and may only be upheld if the government entity demonstrates a compelling reason for the regulation. *See Simon & Schuster, Inc. v. Members of the New York State Crime Victims Bd.*, 502 U.S. 105, 118, 112 S.Ct. 501, 116 L.Ed.2d 476 (1991) (in order to justify differential treatment of speech on the basis of content, "the State must show that its regulation is necessary to serve a compelling state interest and is narrowly drawn to achieve that end") (quoting *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 231, 107 S.Ct. 1722, 95 L.Ed.2d 209 (1987)); *City of Renton*, 475 U.S. at 46-47, 106 S.Ct. 925.

2. Content-Neutral Regulations Receive Intermediate Scrutiny

On the other hand, regulation of adult entertainment is "content-neutral" if it is "'*justified* without reference to the content of the regulated speech,'" *City of Renton*, 475 U.S. at 48, 106 S.Ct. 925 (quoting *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 771, 96 S.Ct. 1817, 48 L.Ed.2d 346 (1976)), and if the legislative body's "predominate concerns" in enacting it were to address the undesirable secondary effects of adult businesses, for example, concerns such as preventing crime, "protect[ing] the city's retail trade, maintain[ing] property values, and generally 'protec[ting] and preserv[ing] the quality of [the city's] neighborhoods, commercial districts,

and the quality of urban life,'" *id.*[40] Even if the legislative body's motivation in enacting various restrictions on adult businesses was based *in part* by a desire to suppress expressive activity, that fact alone would not render those provisions content-based, and thus invalid, so long as the legislative body's *predominate* motivation was to regulate secondary effects. In *City of Renton*, the Supreme Court specifically held that the relevant inquiry is to determine the City Council's "predominate" intent and that an ordinance is not invalid if restricting the adult businesses' First Amendment rights was merely "*a motivating factor*" in the City's decision to enact the ordinance. 475 U.S. at 47-48, 106 S.Ct. 925 (emphasis in original).

If a court determines that a regulation that affects protected speech is content-neutral, then the court must apply intermediate scrutiny. Under intermediate scrutiny, a court may uphold the regulation only if it is:

(1) narrowly tailored[41]

(2) to serve a substantial governmental interest[42] and

(3) does not unreasonably limit alternative avenues of communication.[43]

---

[40] The Fifth Circuit has held that a city may show the requisite secondary effects by documenting that adult businesses "adversely affect property values, cause an increase in crime, encourage businesses to move elsewhere, and contribute to neighborhood blight." *Lakeland Lounge of Jackson, Inc. v. City of Jackson*, 973 F.2d 1255, 1259 (5th Cir.1992).

[41] *See Woodall v. City of El Paso*, 49 F.3d 1120, 1122 (5th Cir.1995) (citing *City of Renton*, 475 U.S. at 46-48, 106 S.Ct. 925).

[42] *City of Renton*, 475 U.S. at 47, 106 S.Ct. 925.

[43] *Id.*

A regulation is "sufficiently well tailored" to meet the narrow tailoring requirement if it "effectively promotes the government's stated interest," *SDJ*, 837 F.2d at 1276, and does not "burden substantially more speech than necessary to further those interests," *Turner Broadcasting System, Inc. v. F.C.C.*, 520 U.S. 180, 117 S.Ct. 1174, 1186, 137 L.Ed.2d 369 (1997) (*Turner II*); *Ward v. Rock Against Racism*, 491 U.S. 781, 799, 109 S.Ct. 2746, 105 L.Ed.2d 661 (1989).[44]

---

[44] Plaintiffs strenuously argue that the Supreme Court's recent declarations in *Turner II* and *Ward* that a regulation is narrowly tailored if it does not "burden substantially more speech than necessary to further those interests," overrules the Fifth Circuit's holding in *SDJ* that "an ordinance is sufficiently well tailored if it effectively promotes the government's stated interest," *SDJ*, 837 F.2d at 1276. Although the Fifth Circuit's description of the narrow tailoring test was taken directly from the Supreme Court's opinion in *United States v. Albertini*, 472 U.S. 675, 689, 105 S.Ct. 2897, 86 L.Ed.2d 536 (1985) ("an incidental burden on speech is no greater than is essential, and therefore is permissible under *[United States v.] O'Brien*, [391 U.S. 367, 377, 88 S.Ct. 1673 (1968)] as long as the neutral regulation promotes a substantial government interest that would be achieved less effectively absent the regulation"), Plaintiffs argue that this description of the test is logically unsound and directly conflicts with the Supreme Court's decision in *Schad*, 452 U.S. 61, 101 S.Ct. 2176, that a ban on all forms of live entertainment was impermissible, even though the ban would have effectively achieved the county's goal of restricting the negative effects of adult entertainment. *See* FTU's Response [Doc. # 170], at 7-9.

This Court is not persuaded that the narrow tailoring requirement described in *SDJ* was altered in any material way by *Turner* and *Ward* because, in both of those cases, the Supreme Court *also* quoted the *Albertini* language, which the Fifth Circuit relied on in *SDJ*, that "an ordinance is sufficiently well tailored if it effectively promotes the government's stated interest." *Turner I*, 512 U.S. at 662, 114 S.Ct. 2445; *Ward*, 491 U.S. at 799, 109 S.Ct. 2746 (both quoting *Albertini*, 472 U.S. at 689, 105 S.Ct. 2897). Thus, it appears that the current Supreme Court narrow tailoring standard is an amalgam of or requires both prongs of the standard quoted above. *See also Simon & Schuster*, 502

(Continued on following page)

As for the second element of the *City of Renton* intermediate scrutiny test, municipal regulation of sexually oriented businesses serves a "substantial governmental interest" when it is designed to combat negative secondary effects associated with those businesses. *See SDJ*, 837 F.2d at 1274.[45] *See also TK's Video v. Denton County, Texas*, 24 F.3d 705, 709-10 (5th Cir.1994).

As for the third *City of Renton* element, an ordinance does not unreasonably limit "alternative avenues of communication" if it provides adult businesses with "a reasonable opportunity to own and operate their businesses." *Woodall*, 49 F.3d at 1126.

Plaintiffs' primary line of attack is to argue that Ordinance 97-75 is invalid in full and should be struck down in its entirety under the First Amendment because it is a content-based restraint on speech, enacted by the Houston City Council for the primary purpose of significantly reducing, if not shutting down entirely, the city's sexually oriented business industry. With respect to each challenged provision of the Ordinance, Plaintiffs argue

---

U.S. at 122, 112 S.Ct. 501 ("[a] regulation is not 'narrowly tailored' . . . where, as here, 'a substantial portion of the burden on speech does not serve to advance [the State's content-neutral] goals' " (quoting *Ward*, 491 U.S. at 799, 109 S.Ct. 2746).

In any event, the Court finds the exact wording of this standard immaterial to the resolution of this case because the Fifth Circuit has held that "narrow tailoring is less important when the potential for overbreadth burdens a category of speech subject to less than full first amendment protection; sexually-oriented expression falls into such a category." *SDJ*, 837 F.2d at 1276.

[45] The "substantial governmental interest" test appears to overlap significantly with the threshold analysis of whether a regulation is content-based or content-neutral.

that the provision should be invalidated under strict scrutiny as a content-based restriction. In the alternative, with respect to each challenged provision, Plaintiffs argue that, even if the provision is content-neutral, it is nevertheless invalid because (i) it is not narrowly tailored, (ii) the City Council did not base its enactment on reasonably reliable evidence that the provision would serve a substantial governmental interest, and, (iii) with respect to the Ordinance's new locational restrictions, there is not a sufficient number of adequate alternative sites to which the businesses may relocate under the Ordinance.

3. Distinguishing Content-Based from Content-Neutral Regulations

In assessing whether various provisions of Ordinance 97-75 were designed to address undesirable secondary effects, and thus are content-neutral, or were instead intended to suppress speech, and thus are content-based, the Court must give great deference to the stated goals of the City Council. "It is the legislature, and not the courts, which determines how much testimony is enough to require city action in redressing a perceived problem." *SDJ*, 636 F.Supp. at 1367.[46]

In the preamble to Ordinance 97-75, the City Council included the following language through which it intended to show that the new restrictions on adult businesses and individuals working in adult businesses were enacted to

[46] *See also City of Renton*, 475 U.S. at 50, 106 S.Ct. 925 ("a city's interest in attempting to preserve the quality of urban life is one that must be accorded high respect' ") (quoting *American Mini Theatres*, 427 U.S. at 71, 96 S.Ct. 2440 (plurality opinion)).

address negative secondary effects created by the businesses:

> WHEREAS, the City Council finds that sexually oriented businesses can exert dehumanizing influences on churches, schools, and day care centers, can have negative effects on property values, [and] can contribute to increased criminal activities in the surrounding areas . . . and . . .
>
> WHEREAS, the City Council finds that sexually oriented businesses provide enhanced opportunities for employee participation in various forms of criminal activities, including prostitution, lewd conduct, indecent exposure, obscenity law violations and related crimes that are associated with sexual conduct or sexually-oriented materials; and
>
> WHEREAS, the City has a substantial public concern that its residents be protected from criminal activity and be protected from casual sexual activity that facilitates the spread of sexually transmitted diseases . . .

Preamble to Ordinance 97-75, at 2, 4.

Although these statements of purpose in the Ordinance's preamble are clearly relevant to the Court's determination of whether various provisions are content-neutral, the Court may not rely exclusively on the City Council's conclusory statements regarding its intent. Instead, the Court must also consider whether the City Council relied on evidence in the legislative record from which it could have reasonably determined that negative secondary effects associated with adult businesses actually exist and that the proposed regulations would in some way

address these effects. *See Lakeland Lounge,* 973 F.2d at 1259; *SDJ,* 837 F.2d at 1274.

In *Lakeland Lounge,* the Fifth Circuit set forth several factors by which courts could judge the trustworthiness of language in an ordinance's preamble that purports to establish that a City's legislative motivation was to combat undesirable secondary effects of sexually oriented businesses. The court explained that:

> [Preamble] language might not save a statute that was formulated without specific attention to secondary effects. Nevertheless, in context here, where (1) the drafters of the ordinance did rely upon studies of secondary effects, (2) a majority of the council members did receive some information about the secondary effects during an open hearing of the planning board, and (3) nothing in the record otherwise suggests impermissible motives on the part of the council members, the language of the preamble shows the city council's awareness of the studies upon which the planning staff relied when framing the ordinance and reflects that a reasonable legislature with constitutional motives could have enacted the ordinance.

Lakeland Lounge, 973 F.2d at 1259 (citing *SDJ,* 837 F.2d at 1274).

In *SDJ,* the Fifth Circuit set forth the following standard for evaluating whether restrictions on sexually oriented businesses are content-based or content-neutral:

> [U]nlike our review under a standard of rationality, we will not hypothesize [a permissible] objective or accept a naked assertion. Rather, we intrude into the regulatory decision process to

> the extent that we insist upon *objective evidence of purpose* – a study or findings. Insisting upon findings reduces the risk that a purported effort to regulate effect is a mask for regulation of content. That is, *evidence of legitimate purpose is supported by proof that secondary effects actually exist and are the result of the business subject to the regulation.* At the same time, it is apparent that as we increase the required precision in findings, we increasingly encounter the difficulties we found unacceptable in [*Shelton v.*] *City of College Station,* [780 F.2d 475 (5th Cir.1986) (en banc)]. Our task in setting the level of review is to strike for that point of equilibrium that vindicates first amendment values at the least cost to a state's decisional arrangements.
>
> Thus, as the Court explained in *City of Renton,* a city may establish its "substantial interest" in the regulation by compiling a record with *evidence that it may be "reasonably believed to be relevant to the problem that the city addresses."* [475 U.S. at 51-52, 106 S.Ct. 925] We do not ask whether the regulator subjectively believed or was motivated by other concerns, but rather whether an objective lawmaker could have so concluded, supported by an actual basis for the conclusion. Legitimate purpose may be shown by reasonable inferences from specific testimony of individuals, local studies, or the experiences of other cities. This level of scrutiny best accommodates the need to ensure proper purposes with the limited competence of courts to discern ephemeral legislative motivations.

SDJ, 837 F.2d at 1274 (emphasis added).

In *City of Renton,* 475 U.S. at 51, 106 S.Ct. 925, the Supreme Court established that a city may enact restrictions

on adult businesses without "conduct[ing] new studies or produc[ing] evidence independent of that already generated by other cities." However, if a City Council relies on studies from other cities, it must have had a basis for believing that such studies are applicable to that city's own problems. *See id.* at 51-52, 106 S.Ct. 925 (evidence from other cities must be "reasonably believed to be relevant to the problem that the city addresses").[47]

Thus, in the case at bar, the City of Houston must demonstrate that, in adopting the various provisions of Ordinance 97-75, City Council members had a reasonable basis for believing that these provisions would address negative secondary effects actually and currently attributable to sexually oriented businesses in Houston.[48] The

---

[47] In this respect, a city's regulation of adult businesses requires justification loosely analogous to that required for a city's adoption of an affirmative action program for local government contracting. In *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 498-99, 109 S.Ct. 706, 102 L.Ed.2d 854 (1989), the Supreme Court held that, in order to justify a local affirmative action program, a city must rely on specific proof of discrimination and cannot base its efforts on mere "generalized" or "amorphous" assertions that discrimination exists. Likewise, in order to demonstrate that a regulation imposed on adult businesses protected by the First Amendment is content-neutral, a city may not rely merely on conclusory assertions that sexually oriented businesses create negative secondary effects, but must instead show that it considered some evidence, or had some other basis for believing, that the regulation would address specific negative secondary effects associated with those businesses.

[48] While the Fifth Circuit indicated in *Lakeland Lounge* some uncertainty about whether legislative findings are still necessary to justify cities' regulation of adult businesses, the court declined to abandon the Supreme Court's holding in *City of Renton* that a city that relies on evidence from other cities must show that the evidence was "reasonably believed to be relevant to the problem that the city addresses," 475 U.S. at 51-52, 106 S.Ct. 925:

(Continued on following page)

Court cannot merely surmise this fact from vague references to evidence in other cities or surmise the current validity of the City Council's purported beliefs regarding specific secondary effects from previous evidence used to support earlier versions of the Ordinance.

The City claims that the existence of negative secondary effects justifying Ordinance 97-75 has already been established as a matter of law in *SDJ*. This Court disagrees. In *SDJ*, the Fifth Circuit determined that the evidence before the City Council in 1983 and 1986 specifically supported the passage of Ordinance 86-323. However that evidence, which was eleven to fourteen years old at the time the City enacted Ordinance 97-75, does not address the additional or continuing secondary effects that the City claims currently exist and justify all its new regulations. In order to extend its prior restrictions on protected businesses, the City must demonstrate that the

---

> In light of *Renton's* holding that a municipality may rely upon other cities' studies of secondary effect, 475 U.S. at 50, 106 S.Ct. 925 . . . and discussion in *Barnes* of the possibility that ordinances may be justified by their secondary effects, without any actual legislative finding, [501 U.S. at 584, 111 S.Ct. 2456 (Souter, J., concurring)], one might argue that legislative findings are no longer necessary, as the record as to secondary effects has already been made. *We need not reach such a conclusion to decide this case, however.*

Lakeland Lounge, 973 F.2d at 1258 n. 1 (emphasis added). This Court therefore concludes that an ordinance regulating sexually oriented businesses must be supported by an appropriate legislative record. To dispense with this requirement would invite courts to engage in sheer and improper speculation as to the validity of a municipality's rationale for its regulations. Thus, this Court is bound by *City of Renton* and *SDJ* to make some inquiry into the legislative record in order to determine whether the challenged provisions of Ordinance 97-75 are actually justified by reference to negative secondary effects associated with adult businesses.

City Council had before it and considered evidence that unwanted secondary effects still exist and that the City Council had a reasonable basis for believing that the new restrictions it enacted would specifically address these effects.[49]

In order for the Court to determine that a given provision of Ordinance 97-75 is content-neutral, the justification for that new provision must have existed in the evidence the City Council considered at the time it enacted the Ordinance, not merely in evidence compiled later in the course of litigation. *See United States v. Virginia,* 518 U.S. 515, 116 S.Ct. 2264, 2275, 135 L.Ed.2d 735 (1996) (in defending government action against constitutional attack, the government's "justification must be genuine, not hypothesized or invented *post hoc* in response to litigation"). This issue raises no difficulty in the case at bar, however, because, in its attempt to show that the new restrictions enacted in Ordinance 97-75 are content-neutral, the City states that it relies solely on the legislative record that was produced by and available to the Houston City Council's Sexually Oriented Business Committee[50] in the course of its deliberations and that was

---

[49] *See infra* note 103 for a discussion of the relevance to this case of the legislative records compiled for previous versions of the Ordinance.

[50] The City Council established this Committee in 1996 to study various issues regarding sexually oriented businesses in the City and to recommend amendments to the entire City Council for the City's Ordinance regulating sexually oriented businesses. The Committee, composed of eight City Council members and co-chaired by Council Members Jew Don Boney, Jr., and Helen Huey, held fifteen meetings and three public hearings between June 1996 and January 1997.

The legislative record provided by the City contains a combination of minutes, transcripts, and videotapes of the Committee's meetings. In this Opinion, the Court refers to transcripts wherever possible and

(Continued on following page)

available to the full City Council at the time it approved Ordinance 97-75.[51]

Because the City does not attempt to justify factually any provision of Ordinance 97-75 as content-neutral by reference to evidence that is not contained in this legislative record, for each challenged provision of Ordinance 97-75, the Court has carefully examined the legislative record to determine whether the Houston City Council had any basis for claiming that the provision was enacted for the purpose of addressing negative secondary effects of adult businesses.[52]

4. The Relevance of *Turner Broadcasting System v. F.C.C.*

A number of Plaintiffs argue at length that First Amendment law has materially changed since the time the Supreme Court decided *City of Renton* and the Fifth Circuit decided *SDJ*. Specifically, they urge that, in light

---

minutes only when a transcript is not included in the record for a particular meeting or hearing. *See infra* note 71 for a more detailed description of the legislative record.

[51] At a pretrial conference, counsel for the City confirmed that the legislative record it has submitted for Ordinance 97-75 constitutes the "universe" of evidence upon which it relies to justify the Ordinance's new provisions. In addition, the Court notes that City Council members were repeatedly urged during the Sexually Oriented Business Committee meetings to send all evidence they had received regarding sexually oriented businesses, including citizen comments and materials from other cities, to the City's Legal Department for inclusion in the legislative record. *See, e.g.*, Minutes for July 22, 1996, Committee Meeting, Exhibit 4C to City's Motion [Doc. # 120], at 2.

[52] While the Court specifically analyzed in detail the portions of the record to which various parties referred in their briefing, the Court also made a thorough independent review of the entire record.

of the Supreme Court's recent decision in *Turner Broadcasting System v. F.C.C.*, 520 U.S. 180, 117 S.Ct. 1174, 137 L.Ed.2d 369 (1997) (*Turner II*), financial impact of a regulation is now relevant to the First Amendment analysis. Under *City of Renton* and *Woodall,* 49 F.3d at 1122, economic impact on adult businesses is not relevant, at least with respect to the issue of whether a regulation allows reasonable "alternative avenues of communication" for adult entertainment. *See City of Renton,* 475 U.S. at 54, 106 S.Ct. 925 ("The inquiry for First Amendment purposes is not concerned with economic impact") (quoting *American Mini Theatres,* 427 U.S. at 78, 96 S.Ct. 2440 (Powell, J., concurring)). In contrast, in *Turner II,* in judging the constitutionality of the must-carry provisions of the Cable Television Consumer Protection and Competition Act of 1992,[53] the Supreme Court engaged in a detailed consideration of the competing financial interests of cable and broadcast television system operators.[54]

This Court is not persuaded that *Turner II* has altered First Amendment doctrine in any way relevant to the case at bar. First and most importantly, *Turner II* involved an entirely different First Amendment context: commercial speech. In contrast, the challenge presented here primarily concerns adult entertainment,[55] a type of speech that has been consistently afforded less constitutional protection than

---

[53] Pub.L. 102-385, 106 Stat. 1460.

[54] The Court upheld these provisions based on its conclusion that they were justified by sufficient evidence before Congress that a substantial governmental interest was at stake.

[55] One new provision enacted in Ordinance 97-75, the provision which extends restrictions on permissible signage for adult businesses, does affect commercial speech. *See* § 28-130. This section of the Ordinance is addressed *infra* in Section V.F.

other forms of speech. *See City of Renton,* 475 U.S. at 49 n. 2, 106 S.Ct. 925 ("'it is manifest that society's interest in protecting this type of expression is of a wholly different, and lesser, magnitude than the interest in untrammeled political debate'") (quoting *American Mini Theatres,* 427 U.S. at 70, 96 S.Ct. 2440 (plurality opinion)); *Woodall,* 49 F.3d at 1122 ("[e]rotic non-obscene printed matter, films, and live entertainment are sheltered by the First Amendment, but enjoy less protection than some other forms of speech, such as political speech"); *TK's Video,* 24 F.3d at 707; *SDJ,* 837 F.2d at 1273. Because *Turner II* concerns a context other than adult entertainment, until and unless the Supreme Court or Fifth Circuit reinterprets First Amendment doctrine pertaining to adult entertainment in light of *Turner II,* this Court is bound by controlling authority specifically related to the adult entertainment context. As the Supreme Court recently explained, lower courts should not conclude that

> more recent [Supreme Court] cases have, by implication, overruled an earlier precedent . . . . "[I]f a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the [lower courts] should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions."

Agostini v. Felton, 521 U.S. 203, 117 S.Ct. 1997, 2017, 138 L.Ed.2d 391 (1997) (quoting *Rodriguez de Quijas v. Shearson/American Express, Inc.,* 490 U.S. 477, 484, 109 S.Ct. 1917, 104 L.Ed.2d 526 (1989)).

Furthermore, in *Turner II,* the Supreme Court considered whether Congress had before it sufficient evidence that broadcast television operators had significant enough

financial need to justify the challenged statutory provisions. *See Turner II,* 117 S.Ct. at 1196. In contrast, here, Plaintiffs appear to argue that the financial harm they will suffer as a result of various provisions of the Ordinance should itself invalidate those provisions. The Court rejects this argument. In the First Amendment context of adult entertainment, the Court's examination of the legislative record must center on the issue of whether the City Council had before it sufficient evidence of negative secondary effects that would justify its new restrictions on the plaintiff businesses. The Court declines to delve into the minutiae of the financial impact of Ordinance 97-75 and thus engage in a speculative interpretation of *Turner II.* Instead, the Court concludes that, in light of *City of Renton* and *Woodall,* economic impact is not itself dispositive of the constitutionality of restrictions on adult businesses.

However, without relying on *Turner II,* the Court agrees with Plaintiffs that evidence that the City Council was aware that a given provision of the Ordinance would have a significant, perhaps devastating, financial impact on the affected businesses is at least *relevant* to the Court's determination of whether that provision is content-neutral or was instead enacted for the primary purpose of restraining speech. *Cf. Simon and Schuster,* 502 U.S. at 115, 112 S.Ct. 501 ("[a] statute is presumptively inconsistent with the First Amendment if it imposes a financial burden on speakers because of the content of their speech") (citing *Leathers v. Medlock,* 499 U.S. 439, 447, 111 S.Ct. 1438, 113 L.Ed.2d 494 (1991)). In other words, if the Houston City Council knew that, although a given provision of Ordinance 97-75 did not expressly ban adult businesses, its financial impact was nonetheless likely to

put a large proportion of them out of business, that fact would be relevant to, although not dispositive of, the issue of whether that provision is content-neutral.

B. Businesses Not Entitled to Heightened First Amendment Scrutiny Receive Rational Basis Review for All Provisions of the Ordinance

All the Plaintiffs in this case contend that, because they are protected by the First Amendment, they are entitled to receive the Court's heightened scrutiny of the challenged provisions of Ordinance 97-75. The Court does not agree, however, that all the Plaintiffs are entitled to this protection under current case law. As mentioned earlier, the only types of adult businesses to which the Supreme Court has expressly extended First Amendment protection are adult bookstores, adult movie theatres, adult video stores, and enterprises that feature nude dancing. In the case at bar, Plaintiffs also include other types of sexually oriented businesses, such as adult modeling studios, adult tanning salons, and adult encounter parlors that do not appear to provide printed entertainment or live or recorded entertainment that features dancing.[16] For the reasons described below, the Court concludes that these other types of adult businesses are not covered by the First Amendment. Rational basis

[16] Most of the Plaintiff businesses in this lawsuit have not expressly indicated what type of businesses they are. However, from the names of the businesses, the Court has discerned that Plaintiffs include some adult modeling studios and adult tanning salons. Also, because Ordinance 97-75 expressly purports to cover adult encounter parlors, *see* § 28-121, it appears probable that some adult encounter parlors are also included among Plaintiffs.

review will be applied to all provisions of Ordinance 97-75 applicable to these non-protected businesses. *See City of Cleburne*, 473 U.S. at 441-42, 105 S.Ct. 3249; *Village of Belle Terre*, 416 U.S. at 7-8, 94 S.Ct. 1536; *SDJ*, 837 F.2d at 1278.

In *FW/PBS*, the Supreme Court noted that adult businesses that do not "purvey[] sexually explicit speech," such as "escort agencies and sexual encounter centers," are not protected by the First Amendment. *FW/PBS*, 493 U.S. at 224, 110 S.Ct. 596 (emphasis added). Although the issue of precisely which adult businesses receive heightened constitutional scrutiny has not been addressed by the Supreme Court or in recent Fifth Circuit cases,[37] in *Stansberry v. Holmes*, 613 F.2d 1285, 1286-88 (5th Cir.1980), the Fifth Circuit expressly declined to extend First Amendment protection to "massage parlors, nude studios, modeling studios, love parlors, and other similar commercial enterprises." There the court concluded that, because the

[37] The ordinances which were challenged in the recent Fifth Circuit cases of *Triplett Grundy, Inc. v. City of Arlington, Texas*, 41 F.3d 1068, 1069 (5th Cir.1994), *HEB Video*, 24 F.3d at 701, *Lakeland Lounge*, 878 F.2d at 1257, and *SDJ*, 837 F.2d at 1271, applied broadly to many types of adult businesses, but the only plaintiffs in those cases were adult bookstores, adult movie theatres, adult video stores, and adult cabarets or lounges. Therefore, in each of these cases, the Fifth Circuit was not presented with the issue of whether other types of businesses would have had standing to raise the constitutional challenges brought there. It is not clear from the court's opinion in *Woodall* exactly what types of adult businesses challenged the El Paso ordinance, but in that case, the Fifth Circuit referred to the First Amendment test as applicable to "[e]rotic non-obscene printed matter, films, and live entertainment." 49 F.3d at 1122. Because in each of these cases the Fifth Circuit by and large upheld, rather than struck down, the challenged ordinances even applying heightened First Amendment scrutiny, the Fifth Circuit had no need to distinguish to which businesses its rulings applied.

Supreme Court had not extended heightened protection to these types of businesses, "no First Amendment interests are at stake here." *Id.* at 1268.

In *Barnes*, 501 U.S. at 566, 111 S.Ct. 2456, a plurality of the Supreme Court reluctantly reaffirmed that nude dancing receives constitutional protection, concluding that "nude dancing . . . is expressive conduct within the outer perimeters of the First Amendment, though we view it as only marginally so." However, in reaching this decision, the Court expressly rejected the proposition that nudity itself constitutes protected expressive activity. *See id.* at 570, 111 S.Ct. 2456.[33]

---

[33] The Court explained that: It can be argued, of course, that almost limitless types of conduct – including appearing in the nude in public – are "expressive," and in one sense of the word this is true. People who go about in the nude in public may be expressing something about themselves by so doing. But the court rejected this expansive notion of "expressive conduct" in *O'Brien*, saying:

> "We cannot accept the view that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea." 391 U.S. at 376, 88 S.Ct. 1673.

And in *Dallas v. Stanglin*, 490 U.S. 19, 109 S.Ct. 1591, 104 L.Ed.2d 18 (1989), we further observed:

> "It is possible to find some kernel of expression in almost every activity a person undertakes – for example, walking down the street or meeting one's friends at a shopping mall [sic] – but such a kernel is not sufficient to bring the activity within the protection of the First Amendment. We think the activity of these dance-hall patrons coming together to engage in recreational dancing – is not protected by the First Amendment." *Id.* at 25, 109 S.Ct. 1591.

Barnes, 501 U.S. at 570, 111 S.Ct. 2456. Justice Souter, concurring in the judgment, repeated that:

> Although [erotic] performance dancing is inherently expressive, nudity per se is not. It is a condition, not an activity,

(Continued on following page)

Hang On, Inc. v. City of Arlington, 65 F.3d 1248, 1254 (5th Cir.1995), the Fifth Circuit explained that "nudity is protected speech only when combined with some other mode of expression which itself is entitled to first amendment protection." *See also DLS, Inc. v. City of Chattanooga*, 107 F.3d 403, 408-410 (6th Cir.1997) (court must make a case-by-case factual inquiry to determine whether erotic entertainment qualifies as speech for First Amendment purposes). The adult enterprises that are Plaintiffs in this case but that do not fall within a category of businesses that has previously been afforded First Amendment protection, including the adult modeling studios, adult tanning salons, and adult encounter parlors, appear to assume that they may piggyback on the First Amendment claims of the other Plaintiffs simply because they provide services involving nudity. However, these businesses have not provided any arguments as to why they should receive First Amendment protection; nor have they provided any evidence from which the Court may conclude that they convey any constitutionally protected "modes of expression." The Court therefore declines to extend heightened constitutional review to the challenged provisions of Ordinance 97-75, as applied to adult modeling

---

and the voluntary assumption of that condition, without more, apparently expresses nothing beyond the view that the condition is somehow appropriate to the circumstances. But every voluntary act implies some such idea, and the implication is thus so common and minimal that calling all voluntary activity expressive would reduce the concept of expression to the point of the meaningless.

Id. at 581, 111 S.Ct. 2456 (Souter, J., concurring in the judgment).

studios, adult tanning salons, and adult encounter parlors.[59]

In describing heightened First Amendment review in *SDJ,* the Fifth Circuit explained the extreme level of deference courts must provide when applying rational basis review: "[U]nlike our review under a standard of rationality, we will not hypothesize such [a permissible] objective or accept a naked assertion." 837 F.2d at 1274. Thus, when an entity does not receive special constitutional protection and rational basis review applies, the Court may hypothesize permissible objectives and accept naked assertions. The Court therefore holds that all provisions of the Ordinance are constitutionally valid as applied to enterprises that are not protected by the First Amendment. The Court accepts the City's contentions that the Ordinance as a whole is a valid exercise of its police power with respect to these enterprises. *See Stansberry,* 613 F.2d at 1288-89 (upholding locational. restrictions on adult businesses not protected by the First Amendment as a valid exercise of County's police power).

C. *Can the Ordinance's Validity Be Determined Through Summary Judgment?*

1. In General

In their original responses to the City's Motion, Plaintiffs strenuously argued that this case raises a

---

[59] In addition, if there are any other Plaintiff businesses in this lawsuit who do not fall into a category of businesses that has previously received First Amendment protection, as described in this section, then the Court's heightened constitutional review will not apply to them either.

variety of factual issues that preclude resolution through summary judgment.[60] In both *City of Renton* and *American Mini Theatres,* the Supreme Court concluded that "'the interests furthered by [the challenged] ordinance[s] are both important and substantial.'" *City of Renton,* 475 U.S. at 50, 106 S.Ct. 925 (quoting *American Mini Theatres,* 427 U.S. at 80, 96 S.Ct. 2440 (Powell, J., concurring)). However, Plaintiffs contend that the Court's conclusions in these cases, as well as the Fifth Circuit's decision to uphold a prior version of Ordinance 97-75 in *SDJ,* do not render the issue of whether Ordinance 97-75 is constitutional one of law and do not mandate the same finding in this case.[61] Instead, Plaintiffs insist that this Court must carefully examine the City's proffered justification for each provision challenged here.

As reflected in the previous section regarding the applicable legal standards, the Court agrees that the question of whether each challenged provision of the Ordinance is content-based or content-neutral, and thus is subject to strict or intermediate scrutiny for the Plaintiffs receiving First Amendment protection, is a factual matter that must be resolved upon the particularities of the current record. *See SDJ,* 837 F.2d at 1275 (noting that

---

[60] As discussed earlier, most Plaintiffs argued in their original responses that, because of these factual issues, the Court could not grant summary judgment for the City. However, in their cross-motions, Plaintiffs shifted to the argument that the Court could grant summary judgment *for Plaintiffs* based on the current record.

[61] *See, e.g.,* FTU's Response [Doc. # 170], at 6 ("[m]erely because the Court of Appeals concluded that the *first* such comprehensive ordinance was a content-neutral effort, does not, *ipso facto,* compel the conclusion that successive and increasingly restrictive ordinances are automatically immune from scrutiny concerning whether they were content-neutral or content-based").

while the Fifth Circuit held in one case that the City of Galveston "had failed to prove a justifiable interest in [its adult business] regulation[62] . . . the record in [*SDJ*] supports exactly the opposite conclusion"). The Court therefore concludes that it must evaluate the validity of the changes enacted in Ordinance 97-75 based on the *current* legislative record. In order for the City to rely on records established in support of previous versions of the Ordinance, the City at least must identify from the current legislative record evidence that City Council members, their staffs, or the City's Legal Department specifically considered how evidence from the prior legislative histories supported the newly enacted provisions. Except with respect to a few challenged provisions, the City failed to make this showing.[63]

Although the answer as to whether a particular regulation of protected businesses is content-neutral varies from case to case and thus generally is a factual issue, the mere existence of a factual dispute will not defeat a proper summary judgment motion. A trial is only necessary where there is a *genuine issue of material fact. See Stafford v. True,* 123 F.3d 291, 294 (5th Cir.1997). A non-movant is entitled to a trial only by demonstrating that it has "significant probative evidence" in support of

---

[62] In *Basiardanes v. City of Galveston,* 682 F.2d 1203, 1215 (5th Cir.1982), the Fifth Circuit struck down a Galveston ordinance restricting permissible locations for adult theatres, based on its conclusion that "there [was] no evidence in the record that the Galveston City Council passed Ordinance 78-1 after careful consideration or study of the effects of adult theatres on urban life."

[63] *See infra* note 103 for a discussion of the City's failure to make this showing with respect to the Ordinance's increased distance requirements.

its rendition of the facts, *Texas Manufactured Hous. Ass'n,* 101 F.3d at 1099, or by showing, pursuant Fed.R.Civ.P. 56(f), how it could obtain such evidence through further discovery.[64] In fact, in *City of Renton* itself, the Supreme Court approved the district court's granting of summary judgment for the City, after concluding that the district court made a proper factual finding.[65] *See also FW/PBS,* 493 U.S. at 221, 110 S.Ct. 596 ("[f]ollowing expedited discovery, petitioners' constitutional claims were resolved through cross-motions for summary judgment").

---

[64] Since all parties have waived their right to a jury, the Court will serve as the factfinder in this matter. Because the issues in this case do not turn on credibility assessments and because Plaintiffs have failed to show what relevant information they now lack, the Court finds that it can resolve most of the factual issues presented here through the parties' documentary evidence submitted with the summary judgment briefing. Although the Dee & Dee Plaintiffs argue that the complexity of this case should in itself preclude its resolution through summary judgment, *see* Dee & Dee's Response [Doc. # 178], at 6-7, the Court finds that the parties have already submitted a quantity of evidence and other material as substantial as, if not more than, that which would be submitted in a trial. The current record fully equips the Court with sufficient expertise to decide most factual issues that may exist. In any event, all of the Plaintiffs have now submitted cross-motions for summary judgment, apparently conceding that most, if not all, of the issues in this case can be resolved through summary judgment.

[65] In *City of Renton,* the Supreme Court referred to the district court's conclusions as "findings" but declined to announce expressly what standard of review it was applying:

> The Court of Appeals' rejection of the District Court's findings on this issue may have stemmed in part from the belief . . . that . . . appellate courts have a duty to review *de novo* all mixed findings of law and fact relevant to the application of First Amendment principles. We need not review the correctness of the Court of Appeals' [belief] since we determine that, under any standard of review, the District Court's findings should not have been disturbed.

475 U.S. at 53 n. 3, 106 S.Ct. 925.

A number of Plaintiffs urge this Court, pursuant to Fed.R.Civ.P. 56(f), to defer ruling on the pending summary judgment motions until the parties have had the opportunity to conduct further discovery.[66] As described in the sections that follow, Plaintiffs have failed to establish the need at this time for additional discovery.[67] Plaintiffs' requests for further discovery are therefore denied.

2. Chil Soung's § 1983 and § 1985 Claims

The Chil Soung Plaintiffs argue that the City's summary judgment motion does not purport to address their conspiracy claim, brought under 42 U.S.C. §§ 1983 and 1985, and that they therefore have no obligation to address this claim at this time.[68] The City responds that its Motion and briefing address all issues raised meaningfully by all Plaintiffs' pleadings. *See* City of Houston's Reply to Chil Soung's Response [Doc. # 208], at 1-2. The Court

---

[66] *See supra* note 13.

[67] *See Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, 28 F.3d 1388, 1396 (5th Cir.1994) ("the mere complaint that more discovery is needed, by itself, does not justify a Rule 56(f) continuance"); *Krim v. BancTexas Group*, 989 F.2d 1435, 1442-43 (5th Cir.1993); *Robbins v. Amoco Prod. Co.*, 952 F.2d 901, 907 (5th Cir.1992).

[68] Plaintiffs set forth their conspiracy claim as follows:

> [T]he City of Houston, acting in concert, unlawfully and unconstitutionally conspired together to eliminate all sexually oriented businesses from the City of Houston in furtherance of a campaign to impose a prior restraint on non-obscene forms of expression presumptively protected by the First Amendment to the United States Constitution and Article I, Section 8 of the Texas Constitution.

Chil Soung Plaintiffs' Response [Doc. # 155], at 4. *See also* Chil Soung Plaintiff's Complaint [Doc. # 103], at 3.

concludes that the Chil Soung Plaintiffs have not meaningfully pursued their conspiracy claim and the claim as pleaded fails to state a legally viable cause of action.[69] These Plaintiffs have been on notice of the City's position and yet have failed to provide any detailed arguments on this claim. Because the Chil Soung Plaintiffs did not seek leave to amend their Complaint and did not set forth their legal theory in response to the City's Motion, their right to amend their Complaint and assert a new theory is waived. *See Spiller v. City of Texas City, Police Department,* 130 F.3d 162, 167 (5th Cir.1997) (court may dismiss claim when plaintiff simply "'declares the adequacy of [her] complaint' in 'response to [a] motion to dismiss'" rather than amending complaint to provide more detailed basis for claim) (quoting *Jacquez v. Procunier,* 801 F.2d 789, 792-93 (5th Cir.1986)).

In any event, as for Chil Soung's § 1983 conspiracy claim, the Court holds, as a matter of law, that Plaintiff cannot state a claim upon which relief may be granted. In order to establish a claim of conspiracy under § 1983, Plaintiffs must prove that the City entered into a willful agreement with another person to deprive Plaintiffs of a constitutional right. *See Daniel v. Ferguson,* 839 F.2d 1124, 1131 (5th Cir.1988). Plaintiffs' conspiracy theory is not

[69] Although Plaintiffs have not supplied full briefing on this claim, they cite one district court case which they suggest allowed a similar conspiracy claim. *See Video Store, Inc. v. Holcomb,* 729 F.Supp. 579 (S.D.Ohio 1990). However, in *Holcomb,* the court was presented with the sole issue of whether federal abstention principles outlined in *Younger v. Harris,* 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971), prevented the court's intervention in pending state court criminal cases brought against sellers and distributors of sexually explicit videotapes. The Court finds *Holcomb* to be factually and legally inapposite to the case at bar.

viable as a matter of law because the commission of a conspiracy requires two independent legal personalities, *see Hilliard v. Ferguson,* 30 F.3d 649, 653 (5th Cir.1994); *Nelson Radio & Supply Co. v. Motorola, Inc.,* 200 F.2d 911, 914 (5th Cir.1952), and Plaintiffs have not alleged any person with whom the City has conspired. *See id.* ("a corporation cannot conspire with itself anymore than a private individual can [and] the acts of the agent are the acts of the corporation").[70]

As for Chil Soung's claim brought under § 1985, the Court finds this claim to be frivolous. The Fifth Circuit has recently made clear that a party may bring a claim under § 1985(3) only to challenge a conspiracy that is alleged to be motivated by racial animus. *See Word of Faith World Outreach Center Church, Inc. v. Sawyer,* 90 F.3d 118, 124 (5th Cir.1996), *cert. denied,* 520 U.S. 1117, 117 S.Ct. 1248, 137 L.Ed.2d 329 (declining "to extend the reach of section 1985(3) to include conspiracies motivated by religious, as opposed, to racial animus"). The current challenge displays no hint of an argument that Ordinance 97-75 was in any way motivated by racial animus. The Court therefore will not allow this claim to proceed.

---

[70] The Court notes also that, although other Plaintiffs here did not label their causes of action as § 1983 claims, the statute through which the entire federal constitutional attack on Ordinance 97-75 addressed by this Opinion is brought is § 1983. *See American Mini Theatres,* 427 U.S. at 55 n, 96 S.Ct. 2440. 9 (First Amendment claim properly brought under § 1983); *Clarke v. Stalder,* 121 F.3d 222 (5th Cir.1997), *reh'g granted,* 133 F.3d 940 (5th Cir.1997) (First Amendment challenge to prison rule properly pled under § 1983). Therefore, to the extent the Chil Soung Plaintiffs claim a violation of § 1983 separate from their conspiracy claim, the City's Motion and this Order address that claim.

3. Other Issues Plaintiffs Claim Have Not Been Addressed by the City's Summary Judgment Motion

Several groups of Plaintiffs deny that the City's Motion covers all issues raised by their Complaints. *See, e.g.,* FTU's Response [Doc. # 170], at 3-5; FTU's Supplemental Cross-Motion [Doc. # 270], at 2-3; Dee & Dee's Response [Doc. # 178], at 54-59; Dee & Dee's Locational Response [Doc. # 214], at 16-18. The Court disagrees. In its Motion, the City seeks a ruling that the Ordinance, as a matter of law, is valid in its entirety. Therefore the City has addressed all of Plaintiffs' claims. The only omissions that Plaintiffs note in the Motion's coverage are the City's failure to address various specific arguments raised by certain Plaintiffs. The Court rejects Plaintiffs' attempts to characterize numerous detailed arguments, many of which have been addressed by the parties' briefing and by the Court in this Opinion, as discrete causes of action. Instead, the Court finds all of Plaintiffs' detailed arguments to be subsumed within Plaintiffs' more general attack to each of the challenged provisions of the Ordinance.

Moreover, since the City contends that its Motion establishes the validity of the Ordinance in its entirety, it is Plaintiffs' burden to point out to the Court any issues or claims that the City's Motion fails to address. The Court has considered all Plaintiffs' responses and the City's replies in determining whether the arguments that Plaintiffs claim the City has not addressed in its Motion actually raise any genuine issues of material fact precluding summary judgment.

Any arguments raised by Plaintiffs that are not addressed explicitly in this Opinion are rejected.

IV. *GENERAL OBJECTIONS TO THE CITY'S EVIDENCE*

The City has submitted what it claims to be the Ordinance's entire legislative record, including all evidence considered by the City Council in passing the Ordinance as well as minutes, transcripts, and videotapes of the Council's Sexually Oriented Business Committee's meetings and public hearings and selected legislative history for prior versions of the Ordinance. *See* Exhibits A-D, 1-43 to the City's Motion for Summary Judgment [Doc. # 120], Supplement to City's Motion [Doc. # 158].[71] To

---

[71] The record consists of the following materials: prior versions of the Ordinance, Exhibits A-D to City's Motion [Doc. # 120]; a "briefing book" for the City Council's 1996-97 Sexually Oriented Business Committee containing background materials on the history of Houston's regulation of sexually oriented businesses, legislative reports for previous versions of the Ordinance, and secondary academic materials regarding pornography, Exhibit 1 to City's Motion; Committee meeting minutes and transcripts, Exhibits 2-4, 6-16, 19, 37; minutes and transcripts of public hearings held by the Committee, Exhibits 3, 5, 18; Committee meeting schedules, memoranda, press releases, and miscellaneous evidentiary materials, Exhibits 2-19, 37-38; a list of private parks in Houston, Exhibit 20; Vice Squad statistics regarding sexually oriented businesses, Exhibit 21; letters received by Council members and the City's Legal Department regarding sexually oriented businesses, Exhibit 22; videotapes viewed by Committee members, Exhibits 40-41; videotapes of three Committee meetings, Exhibits 39, 42-43; transcripts of public hearings held in 1982-90 for earlier versions of the Ordinance, Exhibits 23-35; and two memoranda from City Attorney Gene Locke to the Committee, *see* Supplement to City's Motion [Doc. # 158]. Finally, a summary of the Committee's deliberations and section-by-section explanation of the Ordinance's new provisions are contained in the 1997 Legislative Report, Exhibit 36 to City's Motion.

The City Council relied virtually completely on the Sexually Oriented Business Committee, which was advised by the City's Legal Department, to analyze the issues, debate potential new Ordinance provisions, and to adopt proposed legislation. Indeed, the City did not

(Continued on following page)

support their claim that Ordinance 97-75 is a content-based restriction on speech and should be subjected to strict scrutiny, or in the alternative that the Ordinance is content-neutral but does not serve substantial governmental interests, Plaintiffs wage a multitude of attacks against the legislative record submitted by the City.

For example, Plaintiffs argue that the entire legislative record should be stricken because it is replete with hearsay; contains numerous unauthenticated documents; contains unqualified and unreliable expert testimony; contains conclusory evidence; contains evidence that is not

---

even submit as part of the legislative record the minutes of the January 15, 1997, meeting in which the full City Council voted to enact Ordinance 97-75.

The Legislative Report for the Ordinance, dated January 7, 1997, was adopted by the Committee on the day after Committee members received it, which was one week before the full City Council voted on the proposed Ordinance. At the Committee's final meeting held on January 7, 1997, Committee members voiced strong concern that they were being asked to approve a document that they had not been given a chance to read. *See* Transcript of January 7, 1997, Committee Meeting, Exhibit 19D to City's Motion [Doc. # 120], at 8-14. Although the Report does not appear to contain information or evidence that was not included in the minutes and transcripts of the Committee's meetings and public hearings, this fact nevertheless reflects negatively on the reliability of the Report, which the City has offered to illuminate the City Council's intent in enacting various provisions of the Ordinance.

In addition to the legislative record filed with the City's Motion for Summary Judgment, the City also filed a unilateral "stipulation" regarding various matters, including decisions of the Ordinance hearing officers, lists of City ordinance numbers, and portions of the City Charter. *See* Exhibit 3 to City's Reply to FTU's Locational Response [Doc. # 244]. The FTU Plaintiffs have moved to strike this exhibit on the ground that a "stipulation" is, by definition, the result of an agreement and Plaintiffs did not agree to the admissibility of any of these items. This Motion [Doc. # 253] is **DENIED**. The Court deems these items "exhibits" and acknowledges they are not mutually agreed.

reasonably believable, and, to the extent that it does not address actual secondary effects caused by sexually oriented businesses, is not relevant. *See* Dee & Dee's Motion to Strike [Doc. # 168]; FTU's Objections to City's Evidence [Doc. # 166]; A.H.D.'s Objections to City's Evidence [Doc. # 174]. For the following reasons, the Court rejects all of these arguments.

First, most of the materials contained within the legislative record do not constitute hearsay because they are not offered to prove the truth of the matters asserted within them. Instead, they are offered solely to reveal the scope of the City Council's Sexually Oriented Business Committee's investigation and deliberations and to disclose the evidence considered by the Committee in formulating the provisions of Ordinance 97-75. In other words, the City has not offered minutes and transcripts of Committee meetings and public hearings and evidence considered by Committee members in order to prove that sexually oriented businesses in Houston actually have the adverse impact the City claims to believe that they have. Instead, the City has offered them for the purpose of proving to the Court that the City Council, through its Committee and the City's legal staff, considered adequate amounts and types of evidence to support the new restrictions contained in the Ordinance.

Second, the Court rejects Plaintiffs' arguments that the exhibits comprising the legislative record must be stricken because they are not properly authenticated. In order to authenticate the exhibits as the legislative record, the City submitted an affidavit by the Sexually Oriented Business Committee's custodian of records, Elizabeth Dalheim, in which she avers that these exhibits "are a true and correct copy of the documents received, created and/or

maintained by the Committee" in the course of its deliberations. Affidavit of Elizabeth Dalheim, Attachment to City's Motion [Doc. # 120]. The Court finds this authentication sufficient for the purposes for which the evidence is offered, namely to show the Court what evidence the Committee considered and what transpired during the Committee's meetings and hearings. It is not necessary for the City to have individually authenticated each piece of evidence that the Committee considered, nor was it necessary for the Committee to have only considered evidence that was itself properly authenticated so as to be admissible in court under the Federal Rules of Civil Procedure. Plaintiffs have not raised any serious question as to whether the minutes and transcripts are genuine and as to whether the prior legislative materials submitted by the City actually are materials previously created by the City in support of its earlier sexually oriented business ordinances. Plaintiffs' concerns regarding the authenticity or reliability of evidentiary materials submitted to the Committee are more properly raised as substantive attacks on those materials, and the Court has considered the merits of Plaintiffs' objections as such in assessing the adequacy of the legislative record for each challenged provision of the Ordinance.

Third, the Court declines to strike any of the City's exhibits from the legislative record on the grounds that they are conclusory, are not reliable, or are not reasonably believable. These arguments go to the weight that these materials should be given, not their admissibility. As shown in the following sections, the Court has made substantive decisions as to whether the City Council could have reasonably relied upon the proffered evidence in determining that the provisions of Ordinance 97-75 would

address negative secondary effects associated with constitutionally protected adult businesses.

Finally, the Court rejects Plaintiffs' relevance objections. Plaintiffs contend that the materials in the legislative record are not relevant because they fail to address secondary effects of sexually oriented businesses. Again, this argument goes to the weight which this Court should afford those materials, rather than their admissibility for summary judgment purposes. The Court has therefore considered all legislative history materials submitted by the City in support of Ordinance 97-75.

For these reasons, the Court rejects Plaintiffs' procedural objections to the City's summary judgment evidence. Dee & Dee's Motion to Strike [Doc. # 168] is therefore **DENIED**.[72] FTU's and A.H.D.'s Objections to Defendant's Evidence [Docs. # 166 and 174] and all other similar objections raised by other Plaintiffs are **OVERRULED**.

V. *OBJECTIONS TO SPECIFIC PROVISIONS OF THE ORDINANCE*

A. *Coverage of the Ordinance*

1. Vagueness

The Marketing Organization and the Dee & Dee Plaintiffs argue at length that Ordinance 97-75 is unconstitutionally vague because it does not clearly define what

[72] The Dee & Dee Plaintiffs have submitted two alternative responses to the City's Motion, depending on whether the Court grants or denies their Motion to Strike. Pursuant to the Dee & Dee Plaintiffs' instruction, the Court has considered the response designated for use if the Motion to Strike is *not* granted [Doc. # 178]; the Court has not considered the Dee & Dee Plaintiffs' alternative response [Doc. # 177].

businesses it covers. *See* Marketing Organization's Response [Doc. # 164], at 3-11; Dee & Dee's Response [Doc. # 178], at 38-42. In this argument, Plaintiffs challenge §§ 28-121 and 28-122, the provisions of the Ordinance that define what types of sexually oriented businesses are covered. These provisions, however, are unchanged from the prior version of the Ordinance.[73] Under both the prior and current version of the Ordinance, § 28-122 requires all "enterprises" to obtain a permit in order to operate in Houston. "Enterprise" is defined as:

> An adult bookstore, adult cabaret, adult encounter parlor, adult lounge, adult modeling studio, adult movie theatre or any establishment whose *primary business* is the offering of a service or the selling, renting or exhibiting of devices or any other items intended to provide sexual stimulation or sexual gratification to its customers, and which is distinguished by or characterized by an emphasis on matter depicting, describing or relating to specified sexual activities or specified anatomical areas.

§ 28-121 (emphasis added).

Plaintiffs contend that the Ordinance's failure to define "primary business" in the definition quoted above renders it void for vagueness, or at least creates a fact question regarding whether the Ordinance "give[s] person [s] of ordinary intelligence a reasonable opportunity to

---

[73] The Ordinance's coverage is only expanded in that Article II, containing §§ 28-81 to 28-116, which previously applied only to adult arcades, now, under Ordinance 97-75, also applies to "adult mini-theatres." This expansion of coverage is addressed *infra* in Section V.A.4.

know what is prohibited, so that [they] may act accordingly." *Grayned v. City of Rockford,* 408 U.S. 104, 108, 92 S.Ct. 2294, 33 L.Ed.2d 222 (1972). Plaintiffs contend that the Ordinance constitutes an impermissible "prior restraint" by allowing City officials unbridled discretion in determining what businesses must obtain a permit in order to operate. *See Shuttlesworth v. City of Birmingham, Ala.,* 394 U.S. 147, 151, 89 S.Ct. 935, 22 L.Ed.2d 162 (1969) ("'[an] ordinance which . . . makes the peaceful enjoyment of freedoms which the Constitution guarantees contingent upon the uncontrolled will of an official – as by requiring a permit or license which may be granted or withheld in the discretion of such official – is an unconstitutional censorship or prior restraint upon the enjoyment of those freedoms'") (quoting *Staub v. City of Baxley,* 355 U.S. 313, 322, 78 S.Ct. 277, 2 L.Ed.2d 302 (1958)).

In response, the City argues first that none of the enterprise Plaintiffs in this suit have standing to raise this argument because all have applied for permits or joined in this lawsuit and none have claimed that the Ordinance does not apply to them. The Court concludes that the City's argument on this issue lacks merit since parties who are clearly covered by a law may nevertheless raise First Amendment vagueness challenges to that law on behalf of non-litigants who may not know whether or not they are covered. As the Supreme Court explained in *American Mini Theatres*:

> [A]n exception from traditional rules of standing to raise constitutional issues has reflected the Court's judgment that the very existence of some statutes may cause persons not before the Court to refrain from engaging in constitutionally protected speech or expression. The exception is justified by the

> overriding importance of maintaining a free and open market for the interchange of ideas.

427 U.S. at 60, 96 S.Ct. 2440 (citations omitted).[74] *See also SDJ,* 636 F.Supp. at 1365 n. 2 ("opponents who challenge an ordinance on the basis of the first amendment are 'entitled to rely on the impact of the ordinance on the expressive activities of others as well as their own'") (quoting *Schad,* 452 U.S. at 66, 101 S.Ct. 2176).[75]

---

[74] In *American Mini Theatres,* the Supreme Court continued its observations on standing by explaining that "the litigant is not permitted to assert the rights of third parties" if "the statute's deterrent effect on legitimate expression is not 'both real and substantial,' and if the statute is 'readily subject to a narrowing construction by the state courts.'" 427 U.S. at 60, 96 S.Ct. 2440 (citations omitted). However, this Court may only make these determinations in the course of addressing Plaintiffs' vagueness argument, which is raised on behalf of non-litigants.

[75] There is some dispute among the parties in this action as to whether the current challenge to Ordinance 97-75 is a facial challenge or an "as applied" challenge. The Court need not specifically decide this issue. In *American Mini Theatres,* the Supreme Court found it unnecessary to state expressly whether the challenge at bar was facial or "as applied." Addressing the plaintiffs' argument that the ordinance was impermissibly vague, the Court stated that "even if there may be some uncertainty about the effect of the ordinances on other litigants, they are unquestionably applicable to these respondents." 427 U.S. at 58-59, 96 S.Ct. 2440.

As to some provisions of the Ordinance, for instance the permit requirement for individual managers and entertainers, some Plaintiffs have clearly raised specific "as applied" challenges. These challenges are addressed *infra* at Section V.G.6. The N.W. Enterprises Plaintiffs filed their briefing under the apparent assumption that only facial challenges to the Ordinance are currently at issue and therefore that Plaintiffs would have further opportunity later to raise some "as applied" challenges. Because Plaintiffs have had ample notice that the City has requested the Court to evaluate the validity of the entire Ordinance at the present stage of the proceedings, the Court rejects Plaintiffs' request for further briefing on such unraised issues.

As for the merits of Plaintiffs' vagueness claim, the City notes that a state court has already decided that the term "primary business," as used in Ordinance 91-187, the immediate predecessor to Ordinance 97-75, is not unconstitutionally vague. *See Mayo v. State,* 877 S.W.2d 385, 388-89 (Tex.App. – Houston [1st Dist.] 1994, no writ). *Accord 4330 Richmond,* No. 91-0665, slip. op. at 24.[76] In *Basiardanes,* 682 F.2d at 1210, the Fifth Circuit rejected a claim that the phrase "showing adult films on a 'regular basis'" was unconstitutionally vague, based in part on its conclusion that "state courts may clarify it without insuperable difficulty."[77] Therefore, under *Basiardanes,* the narrowing construction that, for instance, the *Mayo* court has already judicially imposed on the term "primary business" immunizes the term from Plaintiffs' vagueness challenge.[78] The Court finds that Plaintiffs have failed to

---

[76] Judge John Rainey held that "a common sense reading of Ordinance 91-187 reveals that the Ordinance has 'excluded businesses whose activities might incidentally cause sexual stimulation' . . . As such, Ordinance 91-187 is adequately precise; Plaintiffs have fair notice that they are subject to regulation under Ordinance 91-187." *4330 Richmond,* No. 91-0665, slip. op. at 24.

[77] In reaching this conclusion, the *Basiardanes* court relied in part on the Supreme Court's statements in *American Mini Theatres* that a statute may be "'readily subject to a narrowing construction by the state courts.'" 427 U.S. at 60, 96 S.Ct. 2440 (quoting *Erznoznik v. City Jacksonville,* 422 U.S. 205, 216, 95 S.Ct. 2268, 45 L.Ed.2d 125 (1975)).

[78] The Dee & Dee Plaintiffs incorrectly argue that this vagueness challenge cannot be resolved through summary judgment because it raises factual issues regarding whether or not the allegedly vague term will create a chilling effect on protected speech and whether persons of common intelligence may differ in their interpretations of its meaning. *See* Dee & Dee's Response [Doc. # 178], at 40-41. Under *Basiardanes,* the parties need not adduce a factual record on the vagueness or clarity of a term that has already been upheld as sufficiently clear in the same context by other courts. *See* 682 F.2d at 1210.

raise a genuine issue of material fact as to whether the Ordinance defines with sufficient clarity what businesses it regulates. The meaning of "primary business" in the Ordinance's definition of which entities it covers, § 28-121, is not unconstitutionally vague.[79]

2. Overbreadth

As discussed *infra* in Section V.B.3.a., many Plaintiffs argue that the Houston City Council did not have evidence that Plaintiffs' businesses produce undesirable secondary effects on surrounding areas. In addition, the Marketing Organization Plaintiffs contend that, even if some businesses covered by the Ordinance do produce undesirable

---

[79] The term "primary business" in Ordinance 97-75 replaced the term "major business," which appeared in the pre-1991 versions of the Ordinance. This change made the Ordinance consistent with the state enabling statute that allows counties and municipalities to regulate adult businesses, which was amended in 1989 in part to change the term "major business" to "primary business." *See* Tex.Loc. Gov't Code § 243.002 (previously codified at Tex.Rev.Civ.Stat. art. 2372w). The Fifth Circuit has held that the previous term, "major business," was not unconstitutionally vague. *See SDJ,* 837 F.2d at 1278 ("[t]he grant of discretion is based on definitive, intelligible standards and is not unbridled"); *Stansberry,* 613 F.2d at 1290 (use of the term "major business" in the context of defining a sexually oriented business gave fair warning of the conduct described and "excluded businesses whose activities might incidentally cause sexual stimulation"). "[A] mere change of phraseology in the revision of a statute in force before will not change the law previously declared, unless it indisputably appears the Legislature intended a change." *Palmer v. Palmer,* 831 S.W.2d 479, 482 (Tex.App. – Texarkana 1992, no writ). Also, a substantive change is not presumed where, as here, the terms of the earlier statute and the revision have the same meaning. *See Walker v. Money,* 132 Tex. 132, 120 S.W.2d 428, 431 (1938). *See also 4330 Richmond,* No. 91-0665, slip op. at 24 ("Ordinance 91-187 is not unconstitutionally vague because it does not further define the term 'primary' nor is it unconstitutionally vague because it replaces the term 'primary' for the term 'major' ").

secondary effects, the Ordinance is nevertheless overbroad because it also applies to businesses that do *not* produce undesirable secondary effects. Specifically, the Marketing Organization Plaintiffs argue that the Ordinance is overbroad "because it has the ability to sweep within its coverage main-stream bookstores and videostores that typically cannot be classified as 'sexually oriented businesses' and establishments that do not generally produce unwanted secondary effects." Marketing Organization's Response [Doc. # 164], at 13.

The City contends that a "main-stream" business which has, for example, only some material depicting simple nudity would not fall under the Ordinance's coverage because it would not meet the Ordinance's definition of engaging in a "primary business" of providing adult material. *See* City's Reply to Marketing Organization [Doc. # 203], at 7-8. If, however, a business that considers itself to be "main-stream" actually meets the Ordinance's definition of a covered enterprise, then, in the judgment of the City Council, based on the evidence it considered in enacting the Ordinance, that business is in the class of businesses which produce undesirable secondary effects in need of City regulation.

The Court rejects the Marketing Organization Plaintiffs' overbreadth challenge. As described in the previous section, Ordinance 97-75 covers the same categories of businesses as the previous versions of the Ordinance which have been upheld. *See SDJ,* 837 F.2d at 1273-74. Although the Court will consider in the following sections whether the Houston City Council had sufficient evidence to support the increased restrictions of Ordinance 97-75 on constitutionally protected sexually oriented businesses, the

Court has no basis on which to invalidate the Ordinance merely because of the breadth of the Ordinance's coverage.

3. Enterprises Containing Coin-Operated Machines

The N.W. Enterprises Plaintiffs argue that Ordinance 97-75 cannot apply to adult arcades and adult mini-theatres containing coin-operated machines because, if it did, it would conflict with and thus be preempted by a provision of the state statute that enables Texas counties and municipalities to regulate sexually oriented businesses, Tex.Loc. Gov't Code § 243.005(b). *See* N.W. Enterprises' Response [Doc. # 151], at 10. The Court is not persuaded by this argument.

In *Dallas Merchant's and Concessionaire's Ass'n v. City of Dallas,* 852 S.W.2d 489 (Tex.1993), the Texas Supreme Court explained the law concerning state law preemption and the power of home-rule cities, such as Houston, as follows:

> An ordinance of a home-rule city that attempts to regulate a subject matter preempted by a state statute is unenforceable to the extent it conflicts with the state statute. However, the mere fact that the legislature has enacted a law addressing a subject does not mean the complete subject matter is completely preempted. A general law and a city ordinance will not be held repugnant to each other if any other reasonable construction leaving both in effect can be reached. Thus, if the Legislature chooses to preempt a subject matter usually encompassed by the broad powers of a home-rule city, it must do so with unmistakable clarity.

Id. at 491 (citations and quotation marks omitted).

Plaintiffs argue specifically that, to the extent that Ordinance 97-75 purports to regulate enterprises containing coin-operated machines, it is preempted by Tex.Loc. Gov't Code § 243.005(b). The Court does not find that § 243.005(b) conflicts with any part of Ordinance 97-75 with sufficient clarity to create preemption. This statute provides that:

> A regulation adopted under this chapter *may not discriminate against a business* on the basis of whether the business holds a license or permit under the Alcoholic Beverage Code or *on the basis of whether it contains one or more coin-operated machines* that are subject to regulation or taxation, or both, under Chapter 8, Title 132, Revised Statutes.

Tex. Loc. Gov't Code § 243.005(b) (emphasis added). Ordinance 97-75 does not violate this statute. Provisions of the Ordinance which regulate businesses containing coin-operated machines do not regulate these businesses *on the basis that* they contain coin-operated machines, but instead on the basis that they provide adult entertainment.

In *SDJ,* the district court rejected a similar preemption argument regarding the City's regulation of adult businesses that hold licenses to sell alcohol. *See* 636 F.Supp. at 1373-74 ("the fact that a business has a liquor license does not insulate it from other forms of municipal regulation . . . because the Ordinance does not regulate the land use of these businesses on the basis of their alcohol use, but regulates them as a result of the secondary affects [sic] they have on surrounding areas").

Moreover, Plaintiffs' interpretation of § 243.005(b) is in clear conflict with the statutory provision that immediately precedes it. Section 243.005(a) states that:

> *A business is not exempt from regulation under this chapter* because it holds a license or permit under the Alcoholic Beverage Code authorizing the sale or service of alcoholic beverages or *because it contains one or more coin-operated machines* that are subject to regulation or taxation, or both, under Chapter 8, Title 132, Revised Statutes.

Tex. Loc. Gov't Code § 243.005(a) (emphasis added).

The Court therefore finds that Ordinance 97-75 is not in conflict with and is not preempted by Tex. Loc. Gov't Code § 243.005(b).[80]

---

[80] In *Hang On*, 65 F.3d at 1257, the Fifth Circuit rejected an analogous argument to the one raised here by the N.W. Enterprises Plaintiffs. There, the plaintiffs claimed that a city's "no-touch" ordinance that applied to adult cabarets, which held licenses to serve alcoholic beverages, but not to nude modeling studios, which did not hold licenses, violated a state statute prohibiting discrimination against businesses on the basis of whether they hold alcoholic beverage licenses. The court determined that because the ordinance had only a "loose fit" with businesses holding licenses to serve alcoholic beverages, it did not discriminate against businesses on this basis. The court reasoned that the ordinance had this loose fit because it was both underinclusive and overinclusive: underinclusive in that many businesses served alcohol but were not subject to the regulation because they were not adult cabarets, and overinclusive in that adult cabarets not required to have alcoholic beverage licenses were still subject to the regulation. Likewise in the case at bar, the provisions of Article II of the Code of Ordinances, which apply primarily to businesses containing coin-operated machines, namely adult arcades and adult mini-theatres, do not discriminate against those businesses on the basis that they contain coin-operated machines. As in *Hang On*, the provisions of Article II have only a "loose fit" with the prohibited classification. These

(Continued on following page)

4. Extension of Ordinance's Coverage to Adult Mini-Theatres

The Dee & Dee and N.W. Enterprises Plaintiffs appear to argue that the City had no basis for extending Article II of the Code of Ordinances, which previously applied only to adult arcades, to cover adult mini-theatres as well.[81] *See* Dee & Dee's Response [Doc. # 178], at 56; N.W. Enterprises' Response [Doc. # 151], at 24. The Court rejects this challenge.

In its deliberations, the City Council's Sexually Oriented Business Committee considered evidence that the previous version of Article II, that applied only to businesses providing adult entertainment through machine-operated devices intended for viewing by five or fewer patrons in the same room, was insufficient to meet the City's intended purpose of limiting negative secondary effects associated with businesses that provide adult entertainment through machine-operated devices. Specifically, the Committee concluded that Article II needed to be extended to cover businesses which provide viewing of such adult entertainment in the same room by *more than five* patrons. During one of their meetings, the Committee members were informed that Article II was originally

---

provisions are extremely "underinclusive" in that many businesses that have coin-operated machines but do not provide adult entertainment are not affected by Article II. They are overinclusive because they also apply to businesses that dispense adult entertainment through electronically or mechanically controlled machines that are not specifically coin-operated. *See* § 28-81.

[81] As described *supra* note 35, Article II includes §§ 28-81 to 28-116 of the Code of Ordinances. Article III, which includes §§ 28-121 to 28-136, covers *all* adult business enterprises, including adult arcades and mini-theatres.

based on a California statute that addressed the secondary effects produced by adult arcades. Arcades were defined in that statute as enterprises that provide coin-operated viewing of adult entertainment for five or fewer people in the same room. However, since the time Article II was enacted, a number of businesses in Houston began providing such viewing for more than five people in the same room. These businesses are similar in function to adult arcades, and the City's Legal Department believed that these businesses cause secondary effects similar to adult arcades.[82]

The Court finds that the City Council members could reasonably rely on this explanation and evidence to conclude that adding adult mini-theatres to Article II's coverage would help decrease negative secondary effects created by these businesses, including public lewdness

---

[82] An attorney from the City's Legal Department told the Committee that the arcade regulations contained in Article II were

> designed to eliminate the kind of anonymous sexual contact and criminal activities in peep show facilities that the Committee heard testimony about from the Vice Division. [The attorney] said unfortunately it was modeled on a California ordinance which defined a peep show device as one intended for the viewing of five or fewer persons. He said the City did not get very far into the enforcement of the Arcade Ordinance before the operations that wanted to have this kind of enclosed both [sic] entertainment figured out that by opening it up to six or more persons in terms of the size of the booth they could essentially evade the ordinance. [The Legal Department recommended that the Committee] change the Arcade Ordinance to include mini theatre booths or preview booths or entertainment booths, all of which do not presently fall within the purview [of Article II].

Minutes for October 3, 1996, Committee Meeting, Exhibit 10B to City's Motion [Doc. # 120], at 2.

violations and conditions which may contribute to the spread of sexually transmitted diseases. Therefore, the Court holds that the City had sufficient justification to extend Article II of the Code of Ordinances to cover adult mini-theatres, and thus this extension is a content-neutral amendment to the prior version of the Ordinance. The Court also holds that this extension to adult mini-theatres, like Article II's previous restrictions on adult arcades, is narrowly tailored to achieve a substantial governmental interest and allows operators of adult mini-theatres sufficient alternative avenues of communication. The extension of Article II to cover adult mini-theatres in addition to adult arcades is thus constitutionally permissible.[83]

---

[83] The N.W. Enterprises Plaintiffs argue that there is a genuine issue of fact regarding whether the need for the Ordinance's application to adult movie theatres is supported by substantial evidence because the City has admitted that "there was no finding by the City Council with respect to adult movie theatres that problems were experienced at such establishments similar to those experience [sic] at the enclosed booth businesses." N.W. Enterprises' Response [Doc. # 151], at 24 (citing City's Response to N.W. Enterprises Plaintiffs' First Set of Interrogatories, Exhibit 3 to N.W. Enterprises' Response, at 6). This argument is meritless. Adult movie theatres, other than mini-theatres and arcades, are not subject to the restrictions imposed by Article II. In the remainder of the pertinent interrogatory response, the City explains that the City Council's Sexually Oriented Business Committee found that different types of enterprises required different types of regulation and that the Committee attempted to tailor regulations to specific problems associated with the different types of enterprises. Thus, the City did not "admit" anything by stating that movie theatres experience different problems from enclosed booth businesses.

B. *Locational Restrictions*[84]

Plaintiffs' most fierce challenge to Ordinance 97-75 is against its increased locational restrictions on sexually oriented businesses. These new restrictions consist of four material changes to the earlier versions of the Ordinance. First and most significantly, Ordinance 97-75 increases the minimum distance between sexually oriented businesses and protected land uses from 750 to 1,500 feet. Second, it increases the radius for calculating whether 75% of the tracts in a surrounding area are residential from 1,000 to 1,500 feet. Third, it adds public parks to the list of protected land uses. Finally, it creates a new formula for determining whether an area is 75% residential, which gives greater weight than was previously given to multifamily dwellings.[85]

---

[84] As described earlier, in accordance with the Court's prior scheduling orders, the parties briefed the summary judgment issues in two stages, first addressing all issues other than the Ordinance's locational restrictions and later addressing only the locational restrictions. In its replies, the City has included a number of motions to strike Plaintiffs' responses insofar as they include matters not pertaining the issues designated for briefing in that stage of the case. Because the bifurcation of briefing on the locational and non-locational issues was established as a matter of convenience for the parties and because the City has now had the opportunity to reply to all arguments raised by the Plaintiffs, the bifurcation is no longer relevant to the case. These motions to strike filed by the City [contained in Docs. # 234, 235, 236, 243, and 244] are all therefore **DENIED**.

[85] These new restrictions appear in § 28-125(b), which provides that a sexually oriented business may not obtain an operating permit if "one (1) or more of the following conditions exist":

> (1) The applicant's enterprise is located within *one thousand five hundred (1,500) feet* of any school, church, *public park,* or licensed day care center. Measurements shall be made in a straight line, without regard to intervening structures or objects, from the nearest point on the property line

(Continued on following page)

Plaintiffs wage both statutory and constitutional attacks on these new restrictions. First, they argue that these restrictions are essentially zoning regulations and are therefore impermissible under a recent amendment to the Houston City Charter which prohibits zoning without a voter referendum. *See, e.g.,* FTU's Locational Response [Doc. # 221], at 80-98. In addition, the N.W. Enterprises Plaintiffs argue that, to the extent that these restrictions apply to adult businesses containing coin-operated machines, they are preempted by two state statutes that already provide locational regulation of coin-operated

---

of the applicant's enterprise to the nearest point on the property line of such school, church, *public park,* or licensed day care center;

(2) The applicant's enterprise is located within one thousand (1,000) feet of any other enterprise for which there is a permit. Measurements shall be made in a straight line, without regard to intervening structures or objects, from the nearest point on the property line of the applicant's enterprise to the nearest point on the property line of any other enterprise;

(3) Seventy-five (75) percent or more of the tracts within a circular area, as described herein, are residential in character. The radius of such circular area shall be *one thousand five hundred (1,500) feet,* and the center of such circular area shall correspond to the midpoint of a line joining the two most distant points on the boundary of the tract on which the enterprise is located; *multifamily tracts shall be counted as multiple residential tracts based upon the tax records acreage of the multifamily tract according to the following formula: each one-eighth (1/8th) acre of land or fraction thereof shall be equivalent to one (1) residential tract. For purposes of this calculation a residential tract or multifamily tract shall be considered to be in the circular area in its entirety if any portion of it lies within the circular area.*

§ 28-125(b) (new provisions italicized).

machines. *See* N.W. Enterprises' Response [Doc. # 151], at 10-14. Finally and most strenuously, Plaintiffs contend that the new locational provisions constitute impermissible restrictions on speech under the First Amendment.

Before addressing the constitutionality of the Ordinance's new locational restrictions, the Court must first consider Plaintiffs' local and state statutory arguments. *See United States v. Wells Fargo Bank,* 485 U.S. 351, 354, 108 S.Ct. 1179, 99 L.Ed.2d 368 (1988) (court should "resolve statutory questions at the outset where to do so might obviate the need to consider a constitutional issue"); *Railroad Commission of Tex. v. Pullman,* 312 U.S. 496, 498, 61 S.Ct. 643, 85 L.Ed. 971 (1941) (a federal court should avoid addressing a "substantial constitutional issue . . . if a definitive ruling on the state issue would terminate the controversy"). However, before considering Plaintiffs' local and state statutory arguments, the Court must consider whether abstention is appropriate on these issues.

1. Abstention Question

In *Arizonans for Official English v. Arizona,* 520 U.S. 43, 117 S.Ct. 1055, 1072-75, 137 L.Ed.2d 170 (1997), the Supreme Court cautioned that federal courts should hesitate before addressing federal constitutional claims that could be rendered moot by the resolution of novel state law issues. The Court explained that a lower court, when confronted by such a situation, could avoid making an unnecessary federal constitutional ruling by invoking *Pullman* abstention, or, if available, the less costly option of certifying the state law issue for resolution by a high state court. However, this Court finds several material differences between the Supreme Court's recent pronouncements in

Arizona and the case at bar, which militate against abstention here.

First, in *Arizona,* one party urged the lower federal courts – both the district court and the Court of Appeals – to certify the state law issue for resolution by the Arizona Supreme Court. *See Arizona,* 117 S.Ct. at 1073. Here, in contrast, no party has requested that this Court abstain from deciding any local or state law issues or certify them to the Texas Supreme Court. In fact, parties on both sides of this lawsuit have submitted briefs urging this Court *not* to exercise its abstention power. *See* FTU's Memorandum in Response to Court's Suggestion of *Pullman* Abstention [Doc. # 272]; City's Memorandum in Opposition to Abstention [Doc. # 321].[86] *See also* Dee & Dee's Memorandum of Law on Abstention [Doc. # 291] (declining to take position on abstention issue).

Second, the Court concludes that the local and state statutory issues raised here are not too novel or difficult for resolution in this forum. State law authorities provide sufficient guidance for this Court on these issues.

Third, with respect to the Houston City Charter issue, the Court finds additional differences between *Arizona*

---

[86] The FTU Plaintiffs have filed an Objection to the City's Memorandum in Opposition to Abstention [Doc. # 326] on the sole ground that the City's Memorandum was filed several weeks late. Because the Court requested these memoranda merely as a courtesy from parties that might be interested in a potentially tangential issue, by filing late the City merely risked the possibility that the Court would not consider the memorandum prior to making its decision on abstention. Moreover, the FTU Plaintiffs' Motion to Strike is utterly frivolous because the City's Memorandum is substantively in complete *agreement* with the FTU Plaintiffs' position on the issue. FTU's Objection [Doc. # 326] is **OVERRULED**.

and the case at bar. One difference is that, here, the City Charter issue involves a question of municipal, not state, law. Although this Court looks to state law for guidance as to whether Ordinance 97-75 established "zoning," as that term was contemplated in the passage of the 1994 amendment to the Houston City Charter, there is no reason to believe that the Texas Supreme Court, which is an expert in state law but not necessarily municipal law, has any more insight than this Court into the intent of the Houston voters when they enacted this amendment.

Another difference between this case and *Arizona* is that, in *Arizona,* the Supreme Court was concerned about avoiding "friction-generating error" by allowing the state court the first opportunity to "'ascertain whether a construction [of the state law] is fairly possible' that will contain the statute within constitutional bounds." 117 S.Ct. at 1074 (quoting *Ashwander v. Tennessee Valley Authority,* 297 U.S. 288, 348, 56 S.Ct. 466, 80 L.Ed. 688 (1936) (Brandeis, J., concurring)). Here, however, the Houston City Charter issue is not one that might merely narrow the reach of the challenged locational restrictions but is instead one that might invalidate these new provisions in their entirety. In other words, in determining whether the locational restrictions were enacted in violation of the Houston City Charter, the Texas Supreme Court would have no judicial incentive to construe those restrictions narrowly in order to avoid constitutional difficulties, and thus this Court need not abstain in deference to the state court's ostensible desire to be guided by such an incentive.

Finally, the Court also notes that the Fifth Circuit has condoned, and has itself engaged in, federal court consideration of state statutory issues in the course of ruling on

the constitutionality of municipal ordinances regulating adult entertainment. *See SDJ,* 837 F.2d at 1280. In addition, in *Louisiana Debating and Literary Ass'n v. City of New Orleans,* 42 F.3d 1483, 1491 n. 10 (5th Cir.1995), the Fifth Circuit affirmed a district court's decision to decline a request for abstention, which the district court based in part on the observation that "*Pullman* abstention is generally inappropriate where First Amendment or fundamental rights are at issue." Noting that "abstention is the exception, not the rule," the Fifth Circuit explained that in determining whether to make

> "the extraordinary decision to stay federal adjudication . . . [a] district court must carefully assess the totality of circumstances presented by a particular case. This requires a broad inquiry which should include consideration of the rights at stake and the costs of delay pending state court adjudication."

Id. at 1491 (quoting *Duncan v. Poythress,* 657 F.2d 691, 697 (5th Cir.1981)). *See also City of Houston v. Hill,* 482 U.S. 451, 467, 107 S.Ct. 2502, 96 L.Ed.2d 398 (1987) ("we have been particularly reluctant to abstain in cases involving facial challenges based on the First Amendment").

In light of its assessment of the totality of the circumstances, this Court concludes that abstention is not warranted on the local and state statutory challenges to the Ordinance's locational restrictions. The Court will proceed to address these arguments in the following sections.[87]

---

[87] For similar reasons, the Court also declines to abstain from deciding Plaintiffs' other state statutory and constitutional claims,

(Continued on following page)

2. Local and State Statutory Arguments

a. Zoning and the Houston City Charter

Plaintiffs argue that the new locational restrictions contained in Ordinance 97-75 constitute zoning regulations and are therefore invalid under a 1994 amendment to the Houston City Charter, which prohibits the enactment of zoning within the City without a referendum. Specifically, this amendment provides that:

> The City of Houston shall have the power to adopt a zoning ordinance only by: (a) allowing a six month waiting period after publication of any proposed ordinance for public hearings and debate and (b) holding a binding referendum at a regularly scheduled election. Any existing zoning ordinance is hereby repealed.

Charter of the City of Houston, Article VIIb, § 13, Exhibit 33 to Appendix to FTU's Locational Response [Doc. # 223]. It is undisputed that Ordinance 97-75 was enacted by a simple vote of the Houston City Council, *not* pursuant to the six month waiting period and referendum requirements of this Charter provision.

The resolution of this issue turns on the meaning of "zoning" in this Charter amendment. The Charter itself does not contain a definition of "zoning."

---

discussed in Sections V.A.3., V.E.1., V.F.4., V.G.4., V.G.5.c., and V.H.5. Because the Court concludes that abstention is not appropriate, the FTU Plaintiffs' Conditional Motion for Injunction Pending Abstention [Doc. # 272] is **DENIED**.

The City contends that the Ordinance's locational restrictions do not violate the Charter referendum requirement because the restrictions do not constitute "zoning." It claims that "[a]lthough the parties and the courts have sometimes loosely characterized the City's locational restrictions under Ordinance 97-75 and its predecessors as 'zoning' requirements, this characterization is actually incorrect." City's Motion [Doc. # 120], at 58. Instead, the City argues that the term "zoning" within the Charter amendment should be construed as having a technical meaning, applicable only to more comprehensive land use plans. In support of this argument, the City cites a secondary legal reference, 101A C.J.S. *Zoning & Land Planning* § 2(a) (1979), which defines "zoning" as the "division of a municipality into districts, and the regulation of buildings and structures in such districts,"[88] as well as several Texas state court cases, including *City of Brookside Village v. Comeau,* 633 S.W.2d 790 (Tex.1982); *MJR's Fare of Dallas v. City of Dallas,* 792 S.W.2d 569, 573 (Tex.App. – Dallas 1990, writ denied); and *City of Houston v. Johnny Frank's Auto Parts Co.,* 480 S.W.2d 774, 778 (Tex.Civ.App. – Houston [14th Dist.] 1972, writ ref'd n.r.e.).

In response, Plaintiffs argue that the Charter amendment is not limited to comprehensive zoning and note that the federal and state cases analyzing locational restrictions on adult entertainment have consistently referred to such restrictions as "zoning." *See, e.g., City of Renton,* 475 U.S. at 49, 106 S.Ct. 925; *SDJ,* 837 F.2d at 1273-74 (specifically referring to Houston Ordinance).

---

[88] It is undisputed that Houston does not have any comprehensive land use plan which divides the city into districts and affirmatively establishes permissible land uses for each district.

The Court agrees with the City that the locational restrictions at issue in this case do not constitute "zoning" as contemplated by the 1994 Charter amendment. Although the federal courts have indeed used the term "zoning" in reference to locational restrictions on adult businesses, that terminology was not arrived at through litigation specifically addressing this issue.

When interpreting a statute that does not define a key term, a court must first look for a case specifically construing the term; if it cannot find such a case, it must then "look to the ordinary, contemporary, common meaning" of the term. *Lightbourn v. County of El Paso, Tex.,* 118 F.3d 421, 429 (5th Cir.1997), *cert. denied,* 522 U.S. 1052, 118 S.Ct. 700, 139 L.Ed.2d 643 (1998) (citing *Perrin v. United States,* 444 U.S. 37, 42, 100 S.Ct. 311, 62 L.Ed.2d 199 (1979) (it is a "fundamental canon of statutory construction . . . that, unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning")). Accordingly, this Court has first considered the state cases cited by the parties and has concluded that, under these cases, Plaintiffs' construction of the term "zoning" is incorrect. This conclusion is further supported by a consideration of the "ordinary, contemporary, common meaning" of the term. Thus, both the case law and a plain meaning analysis lead the Court to conclude that the use of the word "zoning" in the 1994 Charter amendment refers to the context of a more comprehensive plan than is provided by the locational restrictions on sexually oriented businesses contained in Ordinance 97-75.

According to Plaintiffs, the Fifth Circuit conclusively ruled in *Stansberry* that locational restrictions on sexually oriented businesses which were adopted by Harris County, but are similar to the locational restrictions at issue here,

constituted zoning, even though Harris County has no comprehensive zoning plan. This Court disagrees.

In *Stansberry,* the Fifth Circuit rejected the adult business owners' argument that they were even protected by the First Amendment and consequently accepted Harris County's contention that the issue in the case was whether the restrictions were a valid exercise of the County's police power. Although the court stated that because "no First Amendment interests [were] at stake," it would "therefore analyze the provisions by the traditional standards applicable to *zoning* regulations," 613 F.2d at 1288 (emphasis added), and proceeded to refer to the restrictions as zoning throughout the remainder of the opinion, the parties did not *litigate* the issue of whether the restrictions were actually "zoning" regulations *per se* or instead another similar example of the County's exercise of its police power. In other words, the crucial distinction raised in the case at bar was not at issue in *Stansberry.*

In any event, because the City Charter issue raises a question of local law, which is closely intertwined with state law, the Court finds Texas court cases which cast light on the meaning of the term "zoning" to be more relevant than the federal court opinions which appear to refer to locational restrictions on adult businesses as "zoning" simply as a matter of convenience.

Most significantly, in *City of Brookside Village,* 633 S.W.2d at 793, which was decided shortly *after Stansberry,* the Texas Supreme Court noted the possible distinction between a zoning ordinance and a less comprehensive regulation of land use. In that case, the Court upheld two city ordinances which restricted the permissible locations of mobile homes used as residences. Like the Fifth Circuit

in *Stansberry,* the Texas Supreme Court did not specifically confront the question of whether the ordinances constituted zoning[89] but nevertheless held that, because the ordinances "have the *effect* of a zoning regulation," they "are to be scrutinized under . . . principles relating to a municipality's exercise of general police power." *City of Brookside Village,* 633 S.W.2d at 793 (emphasis added). However, in a footnote, the Court suggested that these ordinances, which only restricted the permissible locations for a specific type of land use, did not constitute actual zoning:

> Because Brookside Village, a general law city, has no comprehensive zoning plan, the ordinances in question do not come under article 1011a, which embodies legislative authorization for zoning. *See* Tex.Rev.Civ.Stat.Ann. art. 1011c (zoning power must be exercised under comprehensive plan). A city, however, may regulate land use under its general police powers.

Id. at 793 n. 4.[90] By noting that, under the relevant state statute, "zoning" power must be exercised under a comprehensive plan, the Texas Supreme Court clearly envisioned in this footnote that more specific locational restrictions, enacted under the City's general police powers and not under the authority of the state zoning statute, do not constitute "zoning" but are instead merely

---

[89] The Court did not have to make this decision because "[b]oth parties *concede[d]* that the ordinances in question are essentially zoning or land use ordinances." *City of Brookside Village,* 633 S.W.2d at 792 (emphasis added).

[90] The statutory provision cited here, Tex.Rev.Civ.Stat. art. 1011c, is the predecessor to Chapter 211 of the Texas Local Government Code.

examples of other types of municipal regulation of land use.

Likewise, in *Johnny Frank's Auto Parts,* a Texas Court of Appeals applied the law established by zoning cases, even though it expressly noted that the challenged ordinance was not itself a zoning ordinance. *See* 480 S.W.2d at 778 (because the ordinance was "somewhat akin to a zoning ordinance ... [t]he zoning ordinance cases ... furnish a guide for testing the validity of this exercise of the City's police power"). The court explained, however, that the ordinance, which regulated the operation of automotive wrecking and salvage yards, was not a zoning ordinance because "[i]t does not establish a comprehensive plan by which the city is divided into districts wherein property is limited to specified uses and it was not passed in accordance with the procedures specified for the passage of zoning ordinances." *Id.* Thus, under *Johnny Frank's Auto Parts,* the locational restrictions contained in Ordinance 97-75 do not constitute zoning because they do not establish a comprehensive plan.

Finally, *MJR's Fare of Dallas* does not support Plaintiffs' argument that the locational restrictions at issue here constitute zoning. In that case, a Texas appellate court upheld an ordinance placing locational restrictions on sexually oriented businesses in Dallas, finding no conflict between the restrictions and the Texas zoning enabling statute. There, the restrictions undisputably constituted zoning, but only because the city explicitly incorporated the restrictions into its official zoning ordinance. *See* 792 S.W.2d at 571.

These state cases therefore persuade the Court that Ordinance 97-75 does not violate the City Charter

amendment. In further support of this conclusion, the Court agrees with the City that the "ordinary, contemporary, common meaning" of zoning refers to a comprehensive plan and encompasses regulations that establish affirmatively what land uses are permissible for certain geographic districts, not simply what uses are *not* permissible. This conclusion is supported by Black's Law Dictionary, which defines "zoning" as:

> The division of a city or town by legislative regulation into districts and the prescription and application in each district of regulations having to do with structural and architectural designs of buildings and of regulations prescribing use to which buildings within designated districts may be put. Division of land into zones, and within those zones, regulation of both the nature of land usage and the physical dimensions of uses including height setbacks and minimum area.

BLACK'S LAW DICTIONARY 1618 (6th ed.1990).

The Dee & Dee Plaintiffs creatively argue that the locational restrictions contained in Ordinance 97-75 establish many little districts within the city, each one centered around a school, church, park, or daycare center. *See* Dee & Dee's Response [Doc. # 178], at 51. The Court, however, rejects this argument. Under the "ordinary, contemporary, common meaning" of "zoning," districts that constitute zones cannot be overlapping.

The Court is also unpersuaded by Plaintiffs' argument that the Ordinance's locational restrictions constitute zoning merely because the *Texas Digest* includes annotations to *SDJ* in its "Zoning and Planning" section located under the heading "Validity of Zoning Regulations." *See* 52 TEX.DIG.2d *Zoning and Planning* (Supp.1997). These

headings are created by legal publishers and are not court-specified.

Finally, in determining the "ordinary, contemporary, common meaning" of "zoning," the Court finds it noteworthy that when the City passed the 1994 Charter amendment, no one at the time apparently believed that the amendment's reference to "zoning" would apply to the then-existing locational restrictions on sexually oriented businesses. Although the last sentence in the amendment states that "[a]ny existing zoning ordinance is hereby repealed," no sexually oriented business appears ever to have contended in a legal proceeding that the amendment's passage invalidated the 750 foot minimum distance requirement contained in the prior version of the Ordinance. Plaintiffs offer no reason as to why their City Charter argument would apply only to the new 1,500 foot distance requirement and not the former 750 foot distance requirement. Although Plaintiffs in the case at bar have raised, in their more than 600 pages of briefing, virtually every legal argument imaginable against the City's attempt to regulate their businesses, they have not argued that the 1994 City Charter amendment provision invalidated the prior 750 foot distance requirement. Nor, apparently, did any Plaintiffs raise this argument in *4330 Richmond,* the case challenging the prior version of the Ordinance, which was tried after the 1994 City Charter amendment was passed.[91]

---

[91] Moreover, the leader of the citizen group which petitioned to put the 1994 amendment on the City ballot specifically stated in the local newspaper that the last sentence in the amendment was moot. He wrote: "[s]ince there is no existing zoning ordinance to repeal, the . . . city charter referendum . . . will determine only whether *future* efforts

(Continued on following page)

Finally, Plaintiffs argue that if the locational restrictions in Ordinance 97-75 are not deemed to constitute zoning, then the Houston City Council could circumvent the requirements of the Charter amendment by passing "a series of ordinances gradually regulating all land uses within Houston's limits, arriving in stages at what would amount to a comprehensive plan, without triggering the Charter requirement for a referendum." A.H.D.'s Cross-Motion and Response [Doc. # 173], at 13. The Court need not consider at what point enactments might cross such a line and become impermissible; the City's passage of the Ordinance in this case does not implicate this problem. Instead, the Ordinance merely restricts the potential locations for one type of business within the City; it does not create zones and affirmatively dictate how land may be used in different areas.[92]

---

to zone Houston will require a popular vote." Jim Saltzman, *Require a Vote Before Houston Can Be Zoned,* HOUSTON CHRONICLE, January 12, 1994, Outlook Section, p. 23 (emphasis added). It appears, therefore, that even the drafter of this provision did not himself believe that the amendment would affect the City's then-existing locational restrictions on sexually oriented businesses.

[92] In their argument discussed in this section, Plaintiffs primarily contend that the Ordinance's *locational* restrictions are invalid under the City Charter amendment. *See* A.H.D.'s Response [Doc. # 173], at 8-14; FTU's Locational Response [Doc. # 221], at 80-98; Dee & Dee's Response [Doc. # 178], at 47-52; N.W. Enterprises' Cross-Motion [Doc. # 268], at 2-3. However, the Dee & Dee Plaintiffs also appear to argue that other provisions of the Ordinance, including the restrictions on the businesses' signage, exterior decor, and internal structural configurations also violate the City Charter amendment. *See* Dee & Dee's Response [Doc. # 178], at 51-52. The FTU Plaintiffs also argue that the City's adoption of Ordinance 97-75 in violation of the City Charter constitutes a deprivation of Plaintiffs' due process rights in violation of 42 U.S.C. § 1983. *See* FTU's Locational Response [Doc. # 221], at 98-101. For the reasons described above in the text, the Court rejects all of

(Continued on following page)

b. Locational Restrictions on Enterprises Containing Coin-Operated Machines

The N.W. Enterprises Plaintiffs argue that, to the extent that Ordinance 97-75 purports to impose locational restrictions on adult arcades and mini-theatres containing coin-operated machines, it conflicts with and is thus preempted by two state statutory provisions, Tex.Rev.Civ.Stat. arts. 8814 and 8817, which concern state taxation and regulation of coin-operated machines.[93] The Court rejects this argument.

Article 8814 states that the regulation contained within it and Article 8817 do "not prohibit cities from restricting the exhibition of coin-operated amusement machines within three hundred (300) feet of a church,

---

Plaintiffs' challenges brought under the Houston City Charter amendment.

Similar to their City Charter argument, the FTU Plaintiffs also argue that the Ordinance's locational restrictions violate state law because they constitute zoning and because Tex.Loc. Gov't Code § 211.004 mandates that a city may only enact zoning regulations pursuant to a comprehensive plan. *See* FTU's Locational Response [Doc. # 221], at 92. The Court rejects this argument. As discussed above, the locational restrictions contained in Ordinance 97-75 are not "zoning," as that term is properly used under state law. Moreover, in *City of Brookside Village,* the Texas Supreme Court addressed this very same argument, holding that, notwithstanding the predecessor statute to § 211.004, Texas cities can regulate land use under their general police powers without adopting a comprehensive zoning plan. *See* 633 S.W.2d at 793.

[93] This argument is separate from the one addressed *supra* in Section V.A.3. That section considered Plaintiffs' broader state statutory challenge to the Ordinance's regulation of enterprises containing coin-operated machines, whereas this section considers the permissibility, under two state statutes, of the Ordinance's *locational restrictions* on such enterprises.

school, or hospital." Plaintiffs argue that this provision sets forth the only locational restrictions that cities may impose on any businesses that contain coin-operated amusement machines. Therefore, according to Plaintiffs, the locational restrictions in Ordinance 97-75 conflict with this provision because they prohibit adult businesses containing these machines from being located within 1,500 feet, rather than merely 300 feet, of churches and schools and because the Ordinance prohibits these businesses from locating near protected land uses other than churches, schools, or hospitals, namely daycare centers, public parks, and areas that are at least 75% residential.

The City argues that Article 8814 does not limit the locational restrictions a city may impose on businesses subject to regulation under other statutes. In support of this argument, the City relies in part on *Oniyide v. State,* 756 S.W.2d 370 (Tex.App. – Houston [14th Dist.] 1988, writ ref'd), where a court held that there was no conflict between Articles 8814 and 8817 and a city ordinance that regulated adult arcades. The *Oniyide* court reasoned that, while Articles 8814 and 8817 "'provide comprehensive regulation of music and skill or pleasure coin-operated *machines*' . . . the purpose of the ordinance is to regulate the structural configuration and the operation of adult arcade business premises." 756 S.W.2d at 372 (quoting art. 8817). The N.W. Enterprises Plaintiffs contend, however, that *Oniyide* is not applicable here, since that case and other cases that followed its reasoning did not consider whether any *locational restrictions* on the businesses, as opposed to regulation of the businesses' *structural configurations,* conflicted with Article 8814. Because Articles 8814 and 8817 do not purport to regulate the structural configurations of the business premises but instead address

only potential locational restrictions, Plaintiffs are correct that *Oniyide* does not resolve this issue.

In support of their argument that Articles 8814 and 8817 preempt the locational restrictions that Ordinance 97-75 imposes on businesses containing coin-operated machines, Plaintiffs rely primarily on *B & B Vending Co. v. City of Garland,* 711 S.W.2d 132 (Tex.App. – Tyler 1986, writ ref. n.r.e.). In *B & B,* the court struck down in part a city ordinance that prohibited the location of coin-operated machines within 300 feet of churches, schools, hospitals, or residentially zoned property. The *B & B* court reasoned that, by including residentially zoned property in the list of protected land uses, the ordinance impermissibly went beyond the exceptions allowed by Article 8814. The court explained that "[i]t is a familiar rule of statutory interpretation that an exception makes plain the intent that the statute should apply in all cases not excepted." *Id.* at 134 (citing *Federal Crude Oil Co. v. Yount-Lee Oil Co.,* 122 Tex. 21, 52 S.W.2d 56, 60 (1932)).

The Court finds Plaintiffs' reliance on *B & B* unavailing. In 1989, subsequent to the *B & B* decision, the Texas legislature enacted a statute specifically providing that municipalities could regulate sexually oriented businesses containing coin-operated machines that are regulated under Articles 8814 and 8817. *See* Tex.Loc. Gov't Code § 243.005(a).[94] Under § 243.006, permissible municipal

[94] *See supra* at 53 for the language of § 243.005(a). Prior to the 1989 amendment, § 243.005(a) provided that sexually oriented businesses were not exempt from regulation simply because they hold liquor licenses. The 1989 amendment added to the statute language providing that businesses containing coin-operated machines regulated under Article 8801 *et seq.* (which includes Articles 8814 and 8817) are likewise not exempt from regulation on that basis.

regulation on these businesses includes locational restrictions. Thus, under § 243.005(a), read in conjunction with § 243.006, a city is permitted to set minimum distance requirements between sexually oriented businesses, including those businesses containing coin-operated machines, and whatever land uses the city "finds to be inconsistent with the operation of a sexually oriented business." Tex.Loc. Gov't Code § 243.006. Furthermore, since nothing in § 243.006 restricts the minimum distance requirement between sexually oriented businesses and protected land uses to 300 feet, § 243.006 implicitly allows cities to choose an appropriate minimum distance requirement.[96] Thus, the *B & B* court's reasoning is no longer applicable to the issue raised here and does not invalidate either the Ordinance's 1,500 foot minimum distance requirement between protected land uses and sexually oriented businesses containing coin-operated machines, nor does it invalidate the Ordinance's inclusion of protected land uses not enumerated in Article 8814.

---

[96] The Court's conclusion might be different here if Article 8814 were to contain an *affirmative prohibition* against cities enacting minimum distance requirements in excess of 300 feet or any language indicating that its regulation of coin-operated machines is exclusive. *See Dallas Merchant's and Concessionaire's Ass'n,* 852 S.W.2d at 492-94 (interpreting Tex.Alco.Bev.Code §§ 109.57(a) & (b)). However, Article 8814 does not include such a prohibition or language specifically indicating that its regulation of coin-operated machines is exclusive. Instead, it merely *permits* cities to enact a 300 foot distance restriction and makes no comment about whether other restrictions would also be permissible. Thus, the Court has no reason to believe that the statutory authorization for municipalities to enact distance requirements on sexually oriented businesses containing coin-operated machines, provided by the current version of § 243.005(a) and § 243.006, is limited to the 300 foot restriction allowed by Article 8814.

The Court therefore finds that the locational restrictions contained in Ordinance 97-75 are not in conflict with and are not preempted by Tex.Rev.Civ.Stat. arts. 8814 and 8817. *See also Gordon v. State,* 757 S.W.2d 496, 502-03 (Tex.App. – Houston [1st Dist.] 1988, pet. ref'd) (finding no conflict between Article 8814 and prior version of Ordinance 97-75).

3. First Amendment Challenge

Having concluded that the locational restrictions contained in Ordinance 97-75 are not invalid under the local and state statutes cited by Plaintiffs in this action, the Court must now turn to the constitutional issues Plaintiffs raise in their attack on these restrictions. As described earlier in Section III.A.3., in order to determine what level of scrutiny should be imposed under the First Amendment on the Ordinance's new locational restrictions on constitutionally protected businesses, the Court must first decide whether the restrictions are content-based or content-neutral. For the reasons described below, the Court concludes that the legislative record does not support the City's contention that the Ordinance's increased distance requirements – namely, the increase in the minimum distance between the businesses and protected land uses from 750 to 1,500 feet and the increase in the radius for calculating whether a surrounding area is residential from 1,000 to 1,500 feet – were enacted for the purpose of combatting negative secondary effects associated with adult businesses; thus these requirements must be subjected to strict scrutiny. However, the Court finds that the City had adequate evidence before it to justify, as content-neutral regulations, the addition of public parks to the list of protected land uses and the new formula which

gives greater weight to multifamily dwellings in the calculation of whether an area is residential; therefore, these restrictions will be evaluated under intermediate scrutiny.

a. Increased Distance Requirements: The New 1,500 Foot Rules

i. Content-Based or Content-Neutral?[24]

Plaintiff's Contentions. – In challenging the new provisions in Ordinance 97-75 that increase the minimum distance between adult businesses and protected land uses from 750 to 1,500 feet and the radius for calculating residential areas from 1,000 to 1,500 feet, Plaintiffs argue primarily that the City enacted these increases without considering any new studies or evidence which establishes that the 750 and 1,000 foot distances required by the previous version of the Ordinance were insufficient to satisfy the legislative interests that the district court and Fifth Circuit acknowledged existed in *SDJ*. Plaintiffs contend that, although the City might have had evidence in 1986 upon which reasonable City Council members could have relied in enacting the 750 and 1,000 distances in the 1986 version of the Ordinance, which was upheld in *SDJ*, the City had no evidence supporting the need for increases in these distances to 1,500 feet in 1997. Therefore, Plaintiffs urge, the City's attempt to expand these

[24] Although this section specifically focuses on the Ordinance's new distance requirements, much of the following discussion regarding the legal test for content-neutrality applies to other challenged provisions of the Ordinance as well.

distance requirements in Ordinance 97-75 must be analyzed as content-based regulation and subjected to strict scrutiny.

Plaintiffs further contend that the adverse secondary effects that the City claims these increased distance requirements will address do not actually exist, or at least that there are factual issues as to whether these alleged effects exist and whether the new requirements will actually alleviate such effects. *See, e.g.*, A.H.D.'s Response [Doc. # 173], at 39; Dee & Dee's Response [Doc. # 178], at 4. For example, they argue that there are factual issues regarding whether sexually oriented businesses currently operating in Houston decrease property values, are associated with higher rates of crime than other types of businesses,[97] and have dehumanizing influences on protected land uses.[98]

However, these arguments regarding the accuracy of the City's purported justifications for the increased distances miss the mark. It is not this Court's role to weigh competing evidence on these factual issues or even to

---

[97] Plaintiffs argue that sexually oriented businesses are not responsible for any more crime than other types of businesses that are open late at night, *see, e.g.*, A.H.D.'s Response [Doc. # 173], at 36; FTU's Locational Response [Doc. # 221], at 68-72, or even than churches, schools, and other protected land uses that are located nowhere near any sexually oriented businesses, *see* Attachments to A.H.D.'s Reply [Doc. # 264].

[98] Plaintiffs argue that adult entertainers express their erotic messages behind closed doors and behind solid, soundproof walls and that their messages are only perceived by willing and paying adult customers. They claim further that visitors to the protected land uses, already located at least two football field lengths away from adult businesses, simply cannot hear or see Plaintiffs' erotic messages. *See* A.H.D.'s Locational Response [Doc. # 218], at 17.

determine whether the evidence upon which the City claims to have relied was highly probative or reliable. This Court is not permitted to examine Plaintiffs' substantive policy arguments regarding the accuracy of the Committee's purported findings or the impact, or lack of impact, sexually oriented businesses in Houston actually have on surrounding areas. In *SDJ,* the district court likewise declined to consider the plaintiffs' policy arguments against the 1986 version of the Ordinance and rejected the plaintiffs' proffered evidence by explaining that "[t]he fact that other experts hold conflicting opinions on the effects of sexually oriented businesses on property values is irrelevant to the Court's first amendment inquiry." 636 F.Supp. at 1367.

This Court's duty instead is merely to determine whether the City Council had before it at least a requisite, albeit relatively minimal, amount of evidence to support each of the challenged amendments to the Ordinance. As discussed *supra* in Section III.A.3., the relevant issue to the question of whether each challenged amendment is content-neutral is whether the City Council's Sexually Oriented Business Committee had before it even a minimal threshold amount of evidence upon which a reasonable Council member *could have* relied in determining whether the purported negative secondary effects actually exist and whether the amendment to the Ordinance would somehow help alleviate those effects. Thus, the Court must consider whether the City has met its burden of supporting the Ordinance's challenged new provisions with evidence *in the legislative record* tying those provisions to negative secondary effects caused by adult businesses.

Legislative Record. – After a thorough examination of the legislative record presented by the City, the Court has concluded that the City's decision to expand the distance requirements in the Ordinance's locational provisions was not based on any evidence of secondary effects that specifically justify these increases.[99] Rather, the preamble to Ordinance 97-75, as well as the minutes and transcripts of the meetings of the City Council's Sexually Oriented Business Committee, reveal that Committee members believed that they could impose whatever locational restrictions they wanted on adult businesses so long as the restrictions left those businesses with an adequate number of alternative sites to which they could legally relocate.

The following clauses in the preamble to Ordinance 97-75 are the only clauses that indicate a legislative purpose behind the increased distance requirements. These clauses show that the City's justification for the increased distance requirements rests entirely on the availability of alternative sites:

> WHEREAS, the City Council finds that the distance of 750 feet previously required between sexually oriented businesses and protected land uses and the radius of 1,000 feet previously used to calculate the percentage of residential tracts in the vicinity of a sexually oriented business . . . were based upon initial studies by the Department of Planning and Development and a concern on the part of the City Council that greater

---

[99] In reaching this conclusion, the Court reviewed the *entire* legislative record, but paid particular attention to the portions of the record specifically cited by the City in support of its arguments. *See, e.g.*, citations listed in City's Motion [Doc. # 120], at 14 & n. 5, 15.

> distances might unduly affect the ability of sexually oriented businesses to find conforming locations to operate within the City; and
>
> WHEREAS, the City Council finds that comprehensive new land use studies by the Department of Planning and Development demonstrate that increasing such distances to 1,500 feet would not unduly impact the availability of conforming sites for sexually oriented businesses; and
>
> WHEREAS, the City Council finds that increasing such distances to 1,500 feet would provide additional and needed protection to the community from the adverse effects of sexually oriented businesses without depriving such businesses of adequate opportunities to locate within the City
>
> . . . .

Preamble to Ordinance 97-75, at 3. In addition, the Committee's discussions about modifying the Ordinance's distance requirements focused exclusively on the issue of the number of alternative sites that would be available if the distances were increased. *See, e.g.,* Transcript of October 23, 1996, Committee Meeting, Exhibit 12D to City's Motion [Doc. # 120]; Minutes for November 4, 1996, Committee Meeting, Exhibit 14B to City's Motion, at 2; Transcript of November 20, 1996, Committee Meeting, Exhibit 15C to City's Motion, at 3-36.

The Committee was assured by the City's Legal Department that the City had already compiled a sufficient legislative record of negative secondary effects caused by sexually oriented businesses when, more than ten years earlier in 1983 and 1986, it passed previous versions of the Ordinance, and that therefore the only constitutional obstacle for imposing stricter locational

requirements was ensuring the existence of sufficient alternative sites.[100] The Committee members were told that they had the opportunity to expand the distance requirements because the City now had a more comprehensive database of land uses throughout the City which allowed City planners to make more accurate estimates of the number of sites that would be available under various restrictions.[101]

Thus, the City expanded the distance requirements based on an incorrect assessment of First Amendment law. The City's argument that there is a sufficient number of alternative sites available to which the businesses may relocate does not address the *threshold* issue raised by Plaintiffs of whether the Ordinance's increased distance requirements were enacted on a content-neutral basis, or

---

[100] *See, e.g.*, Minutes for October 30, 1996, Committee Meeting, Exhibit 13B to City's Motion, at 20 (Legal Department informed Committee that, although City cannot prohibit sexually oriented businesses altogether, it can enact new regulations as long as there are sufficient alternative sites to which they can relocate).

[101] *See, e.g.*, Minutes for June 17, 1996, Committee Meeting, Exhibit 2C to City's Motion [Doc. # 120], at 13 (Legal Department representative told Committee that "we now have a data base that would give the Committee perhaps the opportunity to take a closer look at what types of schemes could be developed that would be constitutional but would perhaps strengthen the language [sic. – probably should be "locational"] provisions of the "ordinance")"; Minutes for October 3, 1996, Committee Meeting, Exhibit 10B to City's Motion, at 8 ("[the] Legal [Department] does think there is substantial room for improving the present distance requirements from churches, schools and daycare centers perhaps to as much as 1500 feet.... [T]hat is feasible based on Planning [Department]'s data without placing undue restrictions on the market for the businesses."); Legislative Report for Ordinance 97-75, Exhibit 36 to City's Motion, at 24 ("[a]dvance [sic] computer technology has brought about a more sophisticated program for determining site availability").

whether instead they were enacted in a content-based manner with the primary purpose of closing or greatly restricting the number of sexually oriented businesses within the City. Prior to evaluating the issue of whether increased distance requirements would allow a sufficient number of alternative sites for protected businesses, the Committee should have considered evidence that these increases were justified on the basis of combatting negative secondary effects produced by the businesses. At a minimum, the Committee should have discussed or somehow considered why the increased distances would address the purported negative secondary effects, already established in the prior legislative records, better than the previous distances.

Indeed, in defending the Ordinance's new distance requirements, most of the evidence upon which the City relies concerning secondary effects is documented in the legislative history for the City's previous versions of the Ordinance. This evidence is the type that might be relevant to the current Ordinance and to this case if it in fact had been considered. However, there is no indication that Council members, their staff, or the City's Legal Department actually contemplated how this eleven to fourteen year-old factual matter could support the increased distance requirements the City enacted.[102] *See Almeda* [sic] *Books,*

[102] Although it is not necessary that City Council members themselves reviewed studies from other cities, *see Lakeland Lounge,* 973 F.2d at 1258 ("[w]e perceive no constitutional requirement that the council members personally physically review the studies of secondary effects; such a holding would fly in the face of legislative reality"), the Court has searched the legislative record in vain for evidence that *someone,* such as Council members, staff, or legal advisers looked at specific evidence from Houston's earlier legislative histories, or even

(Continued on following page)

Inc. v. City of Los Angeles, No. CV-95-7771 (C.D.Cal. Jan. 8, 1998), at 23-38 (evidence contained in legislative history supporting prior adult business ordinance may only justify new ordinance if evidence specifically pertains to problem sought to be addressed by new ordinance). After a thorough examination of the full legislative record, the Court concludes that none of the evidence in the prior legislative histories constitutes sufficient justification for the *new* distance requirements.[103]

---

studies from other cities, in the process of formulating the new distance requirements in Ordinance 97-75.

[103] As part of the legislative history of Ordinance 97-75, the City has submitted sections of the legislative records for its previous sexually oriented businesses ordinances. *See* Exhibits 1, 23-34 to the City's Motion [Doc. # 120] (legislative reports and transcripts of public hearings held in preparation for enactment of previous ordinances). The Court agrees with the City that these materials may be *relevant* to the justifications behind the various challenged provisions of Ordinance 97-75 – but only to the extent that the Houston City Council, the Council's Sexually Oriented Business Committee, or the City's legal staff specifically considered them in enacting Ordinance 97-75. The Court has read every set of minutes for each of the Committee's meetings in 1996-97, as well as the transcripts for the Committee's public hearings, and has failed to find any evidence that anyone on the Committee, Council, or legal staff considered – indeed, even looked at – this prior legislative history with specific reference to whether it supported the increased distance requirements enacted in Ordinance 97-75. Although Committee members made occasional references to the fact that the City previously had compiled a legislative record supporting regulation of adult businesses, *no references* were ever made as to *how* that record specifically supported the increased distances. Instead, the Committee seemed to assume that, because a detailed record had previously been compiled and because its 1986 ordinance was upheld in *SDJ* on the basis of that record, it had virtually *carte blanche* to impose whatever new restrictions it wanted so long as adult businesses retain sufficient alternative avenues of communication. This assumption is not correct. The mere fact that the previous distance requirements have been upheld on the basis of a documented record of negative secondary

(Continued on following page)

At the Sexually Oriented Business Committee's first meeting, a city attorney told the Committee generally that "there is an extensive legislative history for the [existing] ordinance." *See* Minutes for June 17, 1996, Committee Meeting, Exhibit 2C to City's Motion [Doc. # 120], at 11-12. This attorney then told the Committee that his office could make reports from earlier City hearings available for the current Council members. *See id.* However, there is no indication anywhere in the record that any Council members, their staffs, or even the City's Legal Department itself considered how the evidence from this prior history would support the specific amendments to the distance requirements eventually enacted in Ordinance 97-75.

Any references in the Committee's deliberations regarding the current Ordinance by Council members to

---

effects does not release the City from the requirement of compiling a record relevant to *current* secondary effects or at least giving some consideration as to how and whether the negative secondary effects documented by that city in the past, or by other cities, currently exist and would be addressed by the new requirements under discussion. *See City of Renton,* 475 U.S. at 51-52, 106 S.Ct. 925 (evidence taken from another context must be "reasonably believed to be relevant to the problem that the City addresses").

Although there is no evidence in the record that anyone looked at this prior legislative history with an eye toward considering whether increased distance requirements would be justified, the Court has nevertheless examined the portions of the prior legislative history that the City has cited in support of the Ordinance's increased distance requirements. The Court has found no evidence in this history that specifically supports a 1,500 foot minimum distance between sexually oriented businesses and protected land uses or a 1,500 radius for calculating whether an area surrounding a sexually oriented business is residential. Thus, even if this evidence must be considered in determining whether the increased distance requirements are content-neutral, the Court finds no support for these requirements in this evidence.

this earlier history were in passing at best. In fact, the closest reference the Court has found in the record to an analysis of the relevance of the prior history is the following remark, made by Committee Co-Chair Huey at the Committee's second public hearing:

> What I'm looking down at is the legislative history behind the adoption of the council's 1983 ordinance. . . . The – and the important negative effects that were found back in 1990 – back in 1983 were the adverse consequences on the neighborhood protection and enhancement and an adverse effect on property values and a contribution to criminal activities that were ancillary to the operation of crim – sexually oriented businesses. And that's a direct reading.

Transcript of July 29, 1996, Public Hearing, Exhibit 5B to City's Motion [Doc. # 120], at 29-30. This vague reference to the 1983 legislative record illustrates the complete superficiality of the Committee's consideration of the evidence compiled in the earlier legislative records and the utter lack of analysis by the Committee as to how the proposed new distance requirements would address the effects described in the earlier records.

In *SDJ,* in contrast, the Fifth Circuit found that evidence compiled in the record for the City's 1983 ordinance provided sufficient justification for the City's 1986 ordinance, which was enacted a mere three years after the 1983 legislative record was compiled. In *SDJ,* the evidence in the earlier record was specifically relevant to the 1986 enactments. The most significant change brought about by the 1986 ordinance was the inclusion of topless bars in the Ordinance's locational restrictions. The Fifth Circuit found that the legislative record for the 1983 ordinance had

included evidence of negative secondary effects caused by topless bars that could be addressed by the locational restrictions, but the City did not include topless bars in the 1983 ordinance due to limitations imposed at the time by state law. By 1986, state law had been amended to permit cities to impose such regulations on topless bars. Thus the City was able to amend its Ordinance to include these establishments by referencing the evidence in the 1983 legislative record specifically related to them. *See SDJ,* 837 F.2d at 1273 ("[a]lthough the 1986 supplemental report relates no empirical evidence of the effects of topless bars, that report incorporates the 1982 report, which does refer to topless bars"). *See also* Minutes for June 17, 1996, Committee Meeting, Exhibit 2C to City's Motion [Doc. # 120], at 12 (City attorney explains that "[t]here is quite a lengthy explanation in the 1986 report as to the reasons for the changes" from the 1983 ordinance). In the case at bar, in contrast, no evidence in the legislative records compiled in support of the earlier versions of the Ordinance supports the specific increases in the distance requirements enacted in Ordinance 97-75, and Ordinance 97-75 does not contain any specific explanation for the increases related to negative secondary effects, as opposed to availability of alternative sites under the new restrictions.

In the first Committee meeting, Co-Chair Boney explained that one of the Committee's purposes was "[t]o assess and analyze the ordinance with regard to its strengths and weaknesses and review them with regard to how effectively this ordinance protects the interests of the public as well as the rights of the businesses and the purpose for which it was developed." *See* Minutes for June 17, 1996, Committee Meeting, Exhibit 2C to City's Motion,

at 1. As discussed in later sections of this Opinion, the Committee achieved this purpose with respect to most of the issues addressed by the new provisions of the Ordinance. Most of the new provisions were properly developed as a result of the Committee's efforts to consider specific reasons why the previous versions of the Ordinance failed to address various negative secondary effects the Committee believed to be associated with sexually oriented businesses. However, the Committee utterly failed to achieve this goal with respect to the increased distance requirements. It is clear from a review of the record that the Committee simply wished to impose the most stringent distance requirements they thought the law would allow. *See, e.g.,* Minutes for November 4, 1996, Committee Meeting, Exhibit 14B to City's Motion, at 3 (Boney stated that Committee's efforts were intended "to make sure the City imposed the greatest possible distance requirement that would pass Constitutional muster").

The Committee received testimony, both orally at public hearings and in writing by mail, from numerous Houston residents who made clear that they did not like sexually oriented businesses and did not want such businesses in their neighborhoods. However, the Committee received no evidence suggesting that any specific or even identified negative secondary effects continued to exist *because of* any weakness in the prior distance requirements. In other words, the Committee did not receive evidence specifically indicating that, nor did the Committee even engage in any discussion speculating that, sexually oriented businesses cause specific negative secondary effects to protected land uses located more than 750 but less than 1,500 feet away, and on residential areas located

within more than a 1,000 foot radius. Instead, the Committee's assumption was clearly that increased distance requirements would alleviate purported negative secondary effects by simply eliminating many of the sexually oriented businesses entirely. The Committee relied exclusively on the type of evidence illustrated by the testimony of one resident contained in the Transcript of the July 29, 1996, Public Hearing, Exhibit 5B to City's Motion, at 110 (testimony of Walt Plowski), in which the resident stated categorically that sexually oriented businesses have invaded his neighborhood, changed its character, and caused an increase in crime, but made *no* mention of *how far away* these businesses now are from any protected land uses or residential areas.

The record created in support of Ordinance 97-75 contains only a handful of vague references to, and other conclusory testimony regarding, the effects sexually oriented businesses have on surrounding areas. For instance, one resident who testified before the Committee asserted that:

> Studies in Austin, Los Angeles and Indianapolis show that property values around these businesses go down because of the increased crime, noise and objectionable people that are attracted to these places. Phoenix, Arizona, found that areas with sexually oriented businesses endure 40 percent more property crimes and 500 percent more sex crimes than do areas without such establishments.

Transcript of July 29, 1996, Public Hearing, Exhibit 5B to City's Motion [Doc. # 120], at 106-07 (testimony of Chris Branson). After the resident made this statement, Huey stated that she had received some unidentified material he

was distributing and that she had requested that the City's Legal Department verify his statistics and other information. *See id.* at 109. However, no such materials are included in the legislative record; nor is there any indication that the City's Legal Department, the other Council members or even the other Committee members ever obtained the material or pursued such investigation. In addition, although several generalized references were made in the Committee's meetings and public hearings to "studies" of other cities regarding effects of adult businesses on nearby areas, no actual study from any other city is included anywhere in the legislative record for Ordinance 97-75.[104] Therefore, the Court has before it no evidence that the Committee, its staff, or the City's Legal Department actually considered the contents of any studies of secondary effects of sexually oriented businesses in other cities.

Another illustrative example of the type of testimony the Committee heard that related to property values was the vague and unsubstantiated assertion by one city

---

[104] On several occasions, Co-Chair Boney asked speakers who mentioned such studies to forward copies to the Council, but apparently no one heeded his request. *See, e.g.*, Transcript of August 19, 1996, Committee Meeting, Exhibit 7G to City's Motion [Doc. # 120], at 56-57. *See also* Transcript of July 29, 1996, Public Hearing, Exhibit 5B to City's Motion, at 154 (Resident Reese Baker testified that topless bars contribute to the proliferation of child pornography. Boney then asked if he had any sources or studies about child pornography in Houston. Baker replied that he did not, and stated instead, "[t]hat is just my understanding."). In addition, at the Committee's second meeting, Co-Chair "Huey said that the Committee is receiving written offers of support and sharing of experiences from other cities, legal departments and foundations," Minutes for July 15, 1996, Committee Meeting, Exhibit 3D to City's Motion [Doc. # 120], at 5. None of these materials are included in the legislative record presented to the Court.

resident at the first public hearing that "I'm a homeowner who is concerned about the value of my house in which much of my savings are invested." Transcript of July 15, 1996, Public Hearing, Exhibit 3H to City's Motion, at 119 (testimony of Scott Johnson). Another resident testified that several non-sexually oriented businesses have closed in his neighborhood in the past two or three years when sexually oriented businesses came to the area. *See* Transcript of July 29, 1996, Public Hearing, Exhibit 5B to City's Motion, at 79 (testimony of Tony Henshaw). This resident also complained about traffic problems created by a topless club in his area. *See id.* at 76-77. Also, at the Committee's final meeting, Council Member Martha Wong stated generally that undesirable behaviors from topless clubs spill into surrounding neighborhoods. *See* Transcript of January 7, 1997, Committee Meeting, Exhibit 19D to City's Motion, at 48.

However, nowhere in the legislative record did any of these speakers, or any Council member, discuss any specific relationship between these observations and the Ordinance's *old or new* distance restrictions. Thus, *even if* these pieces of testimony could be considered to be evidence of actual negative secondary effects sexually oriented businesses impose on surrounding areas, they still do not indicate why increasing the distance requirements in the Ordinance to 1,500 feet would alleviate or even address these effects any more effectively than the existing 750 and 1,000 foot distance requirements.

At the Committee's public hearing held on July 15, 1996, a psychologist testified, based generally on his knowledge of the field, and not from any specific empirical data, that sexually oriented businesses create a "fertile field for solicitation." *See* Transcript of July 15, 1996,

Public Hearing, Exhibit 3H to City's Motion [Doc. # 120], at 53-57 (testimony of Rob Devinney). However, neither he nor any Council member sought to analyze the import of this statement in connection with specific distances between sexually oriented businesses and protected land uses. For instance, no one asked him how far away from a business this "field for solicitation" might extend, or even whether the 750 foot and 1,000 foot distance requirements were inadequate to alleviate this alleged problem. Another speaker, the psychologist's wife, testified vaguely that she has been stalked by someone in a car who thought she was a prostitute and that her son has also been stalked. *See id.* at 61 (testimony of Laura Devinney). However, this speaker did not even say whether she or her son were in the vicinity of a sexually oriented business at the time.

Police officers presented general evidence to the Committee regarding crime associated with sexually oriented businesses, but there is no testimony in the record suggesting that these crimes have any effect on areas more than 750 feet away from the businesses. For example, at the first Committee meeting, Lieutenant Larry Smith of the Houston Police Department Vice Division testified that the types of crimes associated with topless clubs include public lewdness, indecent exposure, prostitution, and auto theft. *See* Minutes for June 17, 1996, Committee Meeting, Exhibit 2C to City's Motion [Doc. # 120], at 8. The first three of these crimes purportedly occur *inside* the businesses (or in the case of prostitution, at locations entirely away from the businesses[105]), and

[105] At another meeting, Lieutenant Smith explained that prostitution stemming from sexually oriented businesses occurs either on-site at the businesses, or away from the businesses, such as when a patron

(Continued on following page)

auto theft presumably occurs immediately outside the businesses, often in their parking lots.[106]

The only actual crime statistics in the current legislative record are two compilations by the Houston Police Department Vice Division which list in graphical form the number of arrests and convictions made in each of the City's sexually oriented businesses from 1994 to 1996. *See* Exhibit 6B to City's Motion [Doc. # 120]; Sexually Oriented Business Statistics Amended, Exhibit 21 to City's Motion.[107] These statistics are not at all helpful to the City's defense of its new distance requirements. First of all, the graphs do not even indicate what crimes serve as the bases for the reported arrests and convictions. According to Lieutenant Smith, the arrests and convictions depicted

---

and entertainer on-site make an agreement to meet "at a hotel or somewhere else." *See* Minutes for July 22, 1996, Committee Meeting, Exhibit 4C to City's Motion [Doc. # 120], at 5. No one testified before the Committee that prostitution occurs more than 750 but less than 1,500 feet from the businesses. Accordingly, the Committee had no basis for concluding that the crime of prostitution might "spill over" into areas that are within the 750 to 1,500 foot ring around each of the sexually oriented businesses.

[106] Lieutenant Smith testified that auto theft was a problem outside sexually oriented businesses because thieves know that patrons will probably be inside a topless club for an hour and a half. However, he gave no explanation as to why this problem would not be an issue for other establishments as well, such as movie theatres.

[107] At the Committee's second public hearing, a City resident told the Committee that his local civic group had been keeping logs of the criminal activities or adverse activities that occur in his neighborhood, *See* Transcript of July 29, 1996, Public Hearing, Exhibit 5B to City's Motion [Doc. # 120], at 78 (testimony of Tony Henshaw). Even if the Court presumes the logs somehow related to sexually oriented businesses, the logs are not included in the legislative record. Nor is there any indication that they were ever given to the Committee members or to the City's Legal Department.

in these graphs were exclusively for crimes that occurred *inside* the businesses, such as liquor violations, public lewdness, and prostitution. *See* Minutes for July 15, 1996, Committee Meeting, Exhibit 3D to City's Motion, at 6. Thus, these statistics provide no evidence of negative secondary effects the businesses might have on surrounding areas outside the businesses and thus provide no justification for increasing the Ordinance's distance requirements.[108] In addition, even if it could be assumed that these crimes which are committed inside the businesses somehow spill over to affect surrounding outside areas, the graphs do not elucidate whether or not the prior distance requirements were effective or instead needed to be amended. The graphs contain no comparisons of crime rates over time; thus, no comparison may be made regarding the number of criminal incidents that occurred recently versus those that occurred close to the time of enactment of any earlier versions of the Ordinance. Finally, these statistics do not compare the crime rate within or around sexually oriented businesses with the crime rates in or near other businesses that are not subjected to any distance requirements. Lieutenant Smith told the Committee that the Vice Squad staff was compiling a comparison of crime rates in areas with and without sexually oriented businesses but that such an analysis

---

[108] Instead, they provide support only for the City's new regulations that attempt to curb criminal activity *inside* the businesses, namely the new interior structural requirements, discussed *infra* in Section V.E.; the new permit requirement for individuals who work in sexually oriented businesses, discussed *infra* in Section V.G.; and the new "no-touch" and "three-foot" rules, discussed *infra* in Section V.H.

would take a few weeks, *see id.*, but no such report appears in the legislative record.[109]

In sum, no one presented any testimony whatsoever that would allow a City Council member to compare the relative effectiveness of a 750 foot distance requirement and a 1,500 foot distance requirement between sexually oriented businesses and protected land uses or to compare the relative effectiveness of a 1,000 foot radius defining residential areas and a 1,500 foot radius. The record simply does not contain any references to substantive reasons related to secondary effects for expanding the Ordinance's distance requirements.

Primarily, the current record contains denunciations of sexually oriented businesses, not evidence of, or even specific comments regarding, their actual effects on surrounding areas. In Committee hearings, members of the public testified generally that they do not like sexually oriented businesses, that they do not want these businesses in their neighborhoods, and that these businesses cause them and their fellow residents psychological harm.[110] The record is replete with comments that the City

---

[109] Lieutenant Smith and other officers discussed extensively with the Committee what difficulties police officers face in trying to obtain convictions for crimes allegedly committed in sexually oriented businesses. The police department submitted a number of suggestions as to how the Ordinance could be modified to increase the enforceability of criminal laws, but these suggestions all related to behavior that occurs inside the businesses, not outside the businesses in nearby surrounding areas. Thus, these suggestions do not provide a basis for the City's decision to increase the Ordinance's distance requirements.

[110] *See, e.g.*, Transcript of July 15, 1996, Public Hearing, Exhibit 3H to City's Motion [Doc. # 120], at 10-12 (testimony of Karen Kay Kristopher); *id.*, at 27-28 (testimony of Tom Warmath); Transcript of July 29,

(Continued on following page)

needs to "protect our neighborhoods and our children," but the speakers never say how increasing the Ordinance's distance requirements would achieve this goal or specifically decrease any negative secondary effects. Instead, the obvious assumption behind these speakers' words is that the City can help them by simply reducing the number of (or eliminating) sexually oriented businesses within their neighborhoods. The city residents and Council members who made these statements clearly believed that the mere existence of sexually oriented businesses in Houston is what harms neighborhoods and families, and not any excessive proximity between these businesses and protected land uses.[111]

Legal Analysis. – The Supreme Court has specifically held that the types of complaints regarding the impact of sexually oriented businesses outside the business premises that are contained in this record and are described above are not evidence of negative secondary

---

1996, Public Hearing, Exhibit 5B to City's Motion, at 142 (testimony of Hope Dyson).

[111] *See, e.g.*, Co-Chair Huey's Thoughts on Sexually Oriented Businesses, Exhibit 3B to City's Motion, at 1; Transcript of July 15, 1996, Public Hearing, Exhibit 3H to City's Motion, at 83 (testimony of Dolly Madison McKenna) (urging Council to put a "maximum set of strict regulations to the extent possible within the law," explaining conclusorily that, "I do not want to have to explain to my daughter what people are doing there. I do not want to have my son harassed on the street"); *id.* at 116 (testimony of Shirley Hamner) ("[t]he most crucial [issue] as far as our residential area is concerned is the distance of S.O.B.s from residential areas," but no specific evidence provided on what distances would affect any negative secondary effects); Transcript of July 29, 1996, Public Hearing, Exhibit 5B to City's Motion, at 83-84 (testimony of Pete Patterson) (stating that his civic association has been trying to shut down sexually oriented businesses for the last two years).

effects that may justify the enactment of a restriction on protected speech. In *Boos v. Barry,* 485 U.S. 312, 321, 108 S.Ct. 1157, 99 L.Ed.2d 333 (1988), the Court explained that:

> Listeners' reactions to speech are not the type of "secondary effects" we referred to in *Renton.* To take an example factually close to *Renton,* if the ordinance there was justified by the city's desire to prevent the psychological damage it felt was associated with viewing adult movies, then analysis of the measure as a content-based statute would have been appropriate. The hypothetical regulation targets the direct impact of a particular category of speech, not a secondary feature that happens to be associated with that type of speech.[112]

---

[112] The record contains frequent vague references to "dehumanizing effects" sexually oriented businesses impose on surrounding communities. In light of the Supreme Court's statement in *Boos* quoted above, it is not clear whether mere references to "dehumanizing effects" may qualify as evidence of negative secondary effects. As the Dee & Dee Plaintiffs argue, references in the record to dehumanizing effects caused by and immorality exhibited at sexually oriented businesses might more appropriately be characterized as "primary effects" of these businesses. *See* Dee & Dee's Response [Doc. # 178], at 20-21 (citing *44 Liquormart, Inc. v. Rhode Island,* 517 U.S. 484, 116 S.Ct. 1495, 1505, 134 L.Ed.2d 711 (1996) (primary effects are those which are directly caused by the objectionable speech)). *But see City of Renton,* 475 U.S. at 59 n. 3, 106 S.Ct. 925 (Brennan, J., dissenting) (noting that City justified Ordinance based on the following types of evidence: " '[l]ocation of adult entertainment land uses on the main commercial thoroughfares of the City gives an impression of legitimacy to, and causes a loss of sensitivity to the adverse effect of pornography upon children, established family relations, respect for marital relationship and for the sanctity of marriage relations of others, and the concept of non-aggressive, consensual sexual relations' " and that " '[l]ocation of adult land uses in close proximity to residential uses, churches, parks, and

(Continued on following page)

In Committee meetings, City Council members repeatedly expressed their desire to close down sexually oriented businesses in the City, or, if that was not feasible, then to impose as many restrictions as possible on these businesses. For example, at the first Committee meeting, Council Member Judson Robinson asked a police officer what sorts of restrictions seem to be a disincentive to sexually oriented businesses in other cities.[113] In a memorandum distributed to the Committee, Co-Chair Huey stated that "[a]ll of us hear the pleas to just outlaw such businesses. Even though most (maybe all) of us would personally like to do so, we cannot." Exhibit 3B to City's Motion [Doc. # 120], at 1. At the hearing held on July 15, 1996, Council Member John Kelley stated that: "We're going to put every bit of the teeth in this thing that . . . we possibly can to get rid, if possible, without being illegal, to

---

other public facilities, and schools, will cause a degradation of the community standard of morality. Pornographic material has a degrading effect upon the relationship between spouses.' "). It is not clear whether the Supreme Court based its decision to uphold the Renton ordinance on the conclusion that such findings related to "secondary" effects, or whether the Court held instead that although these findings did not relate to secondary effects, they did not comprise a "predominate" motivation behind the ordinance's passage.

Even if such evidence and the references to "dehumanizing effects" of sexually oriented businesses could qualify as a secondary effect, the City has still failed to provide any reference in the legislative record as to how the Ordinance's new distance requirements will specifically alleviate such effects any better than the previous distance requirements, other than by simply decreasing the number of sexually oriented businesses located in the City.

[113] *See* Minutes for June 17, 1996, Committee Meeting, Exhibit 2C to City's Motion [Doc. # 120], at 9 ("[h]e thought that kind of information would be helpful . . . . he thought those were things we could put in an ordinance and perhaps some of these other cities with fewer SOBs have these restrictions in their ordinances").

get rid of or at least to give them a lot of problems or trouble about having sexually oriented businesses. That's what this is all about." Transcript of July 15, 1996, Public Hearing, Exhibit 3H to City's Motion [Doc. # 120], at 31.[114] Several Committee meetings were dominated by discussion of the Council members' desire to find new ways of shutting down sexually oriented businesses.[115]

---

[114] The Court recognizes that statements by individual City Council members are not *dispositive* of the intent of the City Council as an entity. As the Supreme Court noted in *O'Brien* and *City of Renton:*

> It is a familiar principle of constitutional law that this Court will not strike down an otherwise constitutional statute on the basis of an *alleged* illicit legislative motive. . . . What motivates one legislator to make a speech about a statute is not necessarily what motivates scores of others to enact it, and the stakes are sufficiently high for us to eschew guesswork."

City of Renton, 475 U.S. at 48, 106 S.Ct. 925 (quoting *O'Brien,* 391 U.S. at 383-84, 88 S.Ct. 1673) (emphasis added). However, when a court reviews legislative history with the purpose of discerning legislative intent, such statements are clearly *relevant* to the court's analysis.

[115] *See, e.g.*, Minutes for June 17, 1996, Committee Meeting, Exhibit 2C to City's Motion [Doc. # 120], at 6 (Council member asked what the process is for closing down sexually oriented businesses); *id.* at 10 (Council member asked if sexually oriented businesses could be closed down if there have been charges brought for public lewdness on the premises); *id.* at 11 (representative of Council member asked if Council members could be notified earlier when an enterprise applies for a sexually oriented business permit because usually by the time members find out "there is nothing to be done"); *id.* at 16-18 (discussion of difficulties in revoking sexually oriented business permits under existing law); Minutes for July 15, 1996, Committee Meeting, Exhibit 3D to City's Motion, at 6-7 (discussion of why City has not revoked more sexually oriented business permits); Minutes for July 22, 1996, Committee Meeting, Exhibit 4C to City's Motion, at 2-5 (discussion of police officers' difficulties in obtaining convictions that could lead to revocations of sexually oriented business permits); Transcript of January 7, 1997, Committee Meeting, Exhibit 19D to City's Motion, at

(Continued on following page)

In the course of their discussions, Committee members repeatedly paid lip service to the fact that sexually oriented businesses receive some protection under the First Amendment and that the City cannot ban their existence entirely. For example, at the Committee's first public hearing, Co-Chair Boney told the audience that:

> We are quite sensitive and cognizant of the fact that sexually oriented businesses are constitutionally protected. There will be no efforts or intentions or actions by this mayoral council to eliminate sexually oriented businesses for the City of Houston because, quite frankly, the United States Supreme Court has already determined that they do have a right to exist under the First Amendment.

Transcript of July 15, 1996, Public Hearing, Exhibit 3H to City's Motion, at 6.[116] However, this type of conclusory statement does not satisfy the City's burden of showing that the Ordinance's new distance requirements were enacted in order to address negative secondary effects

---

59 (Huey discussed having "a tool box of options to use in order to close those operations down").

[116] *See also* Legislative Report for Ordinance 97-75, Exhibit 36 to City's Motion [Doc. # 120], at 3 ("SOBs enjoy Constitutional protection and must be allowed to exist and operate regardless of feelings about them"); Minutes for June 17, 1996, Committee Meeting, Exhibit 2C to City's Motion, at 1, 20; Minutes for July 15, 1996, Committee Meeting, Exhibit 3D to City's Motion, at 1; Transcript of July 15, 1996, Public Hearing, Exhibit 3H to City's Motion, at 32. In its Motion for Summary Judgment, the City improperly cited a number of conclusory and irrelevant statements, including the statement by Boney quoted in the text, in a string cite in support of its contention that "[t]he legislative history represents compelling evidence of both a need for the challenged regulations *and their consistency with established constitutional requirements.*" City's Motion [Doc. # 120], at 15 (emphasis added).

associated with the businesses. Mere recognition that constitutional issues are at stake does not satisfy the constitutional requirements for imposing restrictions on protected speech.

Despite conclusory statements in the Ordinance's preamble and by some Council members that the purpose behind the increased distance requirements was to combat negative secondary effects of adult businesses, the clear message imparted from the minutes and transcripts of the Committee's discussions is the Committee's belief that the mere existence of sexually oriented businesses is itself what hurts communities in the City, not the precise proximity of these businesses to protected land uses or residential areas. The Committee's emphasis was thus on fighting the businesses themselves, not merely containing secondary effects that may be associated with those businesses. Even the Committee's final Legislative Report demonstrates this fact by stating that the Committee's work "evolved as a result of increasing community concern regarding" – *not* secondary effects caused by, but instead – "the *proliferation* of Sexually Oriented Businesses under the existing regulations." Legislative Report for Ordinance 97-75, Exhibit 36 to City's Motion, at 4.

In determining whether the Ordinance's new distance requirements are content-neutral or content-based, the Court appreciates and has applied the Supreme Court's admonition in *City of Renton* that a regulation is not invalid if restricting adult businesses' First Amendment rights was merely "*a motivating factor*" in the City's decision to enact the ordinance. *See* 475 U.S. at 47-48, 106 S.Ct. 925. The mere fact that Council members made the statements cited above does not preclude the City's enactment of valid increases in the distance requirements it

imposes on adult businesses. Had these statements been supplemented by substantive legislative evidence about the need for *increases* in the distance requirements to alleviate or to address identified secondary effects, or even specific discussion as to why the previous distances were not sufficient, the Court may well have found the new distance requirements to be content-neutral. However, the record does not contain any specific discussion by witnesses or City Council members of this nature.

In sum, the Court has considered the comments by the public and by City Council members in the context of the entire legislative record the City has offered in support of Ordinance 97-75 and concludes that the increased distance requirements were enacted with an impermissible content-based motive.

In *Lakeland Lounge,* the Fifth Circuit upheld locational restrictions on adult businesses as valid content-neutral regulation even though the city admitted to actions that could easily be construed as demonstrating an improper, content-based legislative purpose. Specifically, the City acknowledged that it passed its restrictions in response to the public's opposition to the opening of two topless clubs and acknowledged its frustration with the fact that its earlier attempt to close one adult business down for technical code violations had failed. *See Lakeland Lounge,* 973 F.2d at 1256-57. However, in that case, the city supplemented these admissions with a legislative record tying its new regulations to specific negative secondary effects associated with the adult businesses in issue. *See id.* at 1257-59 (explaining that city attorney's office received studies about effects of adult businesses on other communities and that these studies were discussed at a hearing with members of the community).

In the case at bar, the minutes and transcripts of the Sexually Oriented Business Committee's meetings and hearings contain oblique references to presumed "secondary effects" generally and passing vague references to unsupported assumptions about problems in other cities. However, no actual studies or evidence regarding other cities appears anywhere in the legislative record. In *MD II Entertainment, Inc. v. City of Dallas, Tex.*, 28 F.3d 492, 496 (5th Cir.1994), the Fifth Circuit struck down a restriction on advertising by adult businesses because "the city relied on no studies showing a link between advertising and property values or crime." Similarly, in *FW/PBS,* motel owners challenged their inclusion in the City of Dallas' 1986 sexually oriented business ordinance, arguing that the City had no basis on which to conclude that rental of motel rooms for fewer than ten hours produced adverse secondary effects. The Supreme Court rejected this argument, holding that, because the Dallas City Council had before it a 1977 study by the city of Los Angeles that considered, albeit cursorily, the effect of adult motels on surrounding neighborhoods, this evidence, combined with the reasonableness of the legislative judgment, was "adequate to support the city's determination that [these] motels . . . should be included within the licensing scheme." *FW/PBS,* 493 U.S. at 236, 110 S.Ct. 596. The circumstances here are just as the Fifth Circuit noted in *MD II Entertainment:* "We have no doubt that the interests the city seeks to protect merit protection, but like the district court, we are unable to conclude *on this record* that those interests are served . . . by the ordinance." 28 F.3d at 496 (emphasis added).

The Court agrees with the City that it has the prerogative of experimenting with different possible solutions

to municipal problems even when dealing with First Amendment interests.[117] However, each time a City chooses to impose new restrictions on protected speech, such as Houston has done by increasing its Ordinance's distance requirements for sexually oriented businesses, it must satisfy the requisite constitutional test. Thus, the City overstates its authority when it asserts that "[t]he Supreme Court teaches that cities have *an absolute right* to experiment with measures controlling the undisputed adverse secondary effects of sexually oriented businesses." City's Reply to FTU's Response [Doc. # 225], at 26-27 (emphasis added).

When the City first enacted its distance requirements for sexually oriented businesses, it could have chosen to set the minimum distance between the businesses and protected land uses, and the radius for calculating whether a surrounding area is residential, at 1,500 feet, provided, of course, that these restrictions met the requisite elements of the constitutional test.[118] However, the City instead chose respective distance requirements, not of 1,500 feet, but instead of 750 and 1,000 feet. Now that numerous businesses have relied on that earlier regulatory choice, the City may not make the requirements more

---

[117] In *City of Renton*, the Supreme Court explained that " '[i]t is not [the Court's] function to appraise the wisdom of [the city's] decision to require adult theatres to be separated rather than concentrated in the same areas. . . . [T]he city must be allowed a reasonable opportunity to experiment with solutions to admittedly serious problems.' " 475 U.S. at 52, 106 S.Ct. 925 (quoting *American Mini Theatres*, 427 U.S. at 71, 96 S.Ct. 2440 (plurality opinion)).

[118] In *SDJ*, the Fifth Circuit declined to "second-guess the Council's decision that 750 feet is the most appropriate distance." 837 F.2d at 1276.

stringent without somehow justifying those increases by reference to how the revision might better address the negative secondary effects believed to exist. In other words, although "reform may take one step at a time," *Hang On,* 65 F.3d at 1256 (quoting *Williamson v. Lee Optical of Oklahoma, Inc.,* 348 U.S. 483, 489, 75 S.Ct. 461, 99 L.Ed. 563 (1955)), the City must adduce some justification tied to secondary effects for each step it takes. *See MD II Entertainment, Inc. v. City of Dallas,* 935 F.Supp. 1394, 1397-99 (N.D.Tex.1995) (city prohibited from expanding its adult business restrictions in the absence of new studies which were specifically created for the purpose of justifying the additional restrictions).

Finally, while not relying exclusively on such evidence, the Court finds it relevant that when the Council's Sexually Oriented Business Committee was considering whether to increase the Ordinance's distance requirements, Committee members specifically requested information regarding how many businesses would be affected by the proposed increases. In response, the Committee was told that these increases would force 103 of the City's 119 adult businesses to close down or relocate. *See* Exhibit 19C to City's Motion [Doc. # 120].[119] Although not alone dispositive

[119] The City argues that this evidence is inadmissible and has moved to have it stricken on the ground that it is irrelevant and constitutes hearsay. *See* City's Objections to A.H.D. Plaintiffs' Evidence in Support of their Cross-Motion for Summary Judgment [Doc. # 232], at 3. These objections are **OVERRULED**. This evidence is relevant because it is part of the legislative record and thus may be considered in determining the City Council's motive in enacting the Ordinance's new distance requirements. In addition, this evidence is not hearsay because it is not offered for the truth of the matter asserted, namely the number of businesses that would actually be required to close or relocate, but is instead offered to show what information City Council

(Continued on following page)

of the issue, this evidence buttresses the Court's conclusion that the Houston City Council enacted the increased distance requirements in Ordinance 97-75 with the specific intention of closing many, if not most, of the City's sexually oriented businesses.[120]

---

members received and apparently relied upon in deciding to increase the distance requirements.

[120] This early estimate has apparently proven to be relatively accurate. According to evidence submitted by the N.W. Enterprises Plaintiffs, as of June 26, 1997, only 12 out of 113 existing sexually oriented businesses obtained licenses under Ordinance 97-75, and 101 enterprises were denied licenses, closed, or let their licenses expire. *See* N.W. Enterprises' Response [Doc. # 151], at 24-25 (citing City's "Stipulation Regarding Certain Matters and Documents" and Affidavit of Officer R.F. Foulis). A number of Plaintiffs argue that, if the new locational requirements are allowed to go into effect, then, due to excessive costs, they will shut down their businesses entirely, rather than relocate to new sites. In support of this claim, several FTU Plaintiffs have submitted declarations in which they estimate the costs they would incur in relocating their businesses. *See* Declarations of Marc Diedrich ($1,305,450 for Babe's Cabaret), David Fairchild ($5,030,500 for The Men's Club of Houston), Dallas Fontenot ($6,272,650 for Colorado Bar & Grill), Exhibits Nos. 38-40 to Appendix to FTU's Locational Response [Doc. # 223]. The City has moved to strike these declarations on the grounds that they constitute unsupported lay opinions and that, since they merely allege economic harm, they are not relevant. The Court **DENIES** this Motion to Strike [Doc. # 245]. Under Fed.R.Evidence 701, lay opinions may be admissible when they are based on personal perception and are helpful to a clear understanding of a fact in issue. *See United States v. Riddle,* 103 F.3d 423, 428 (5th Cir.1997). In addition, this evidence has some relevance to the FTU Plaintiffs' claim, since the enormity of these figures suggests that City Council members might have, or should have, realized that forcing enterprises to relocate would be, in many cases, tantamount to shutting them down. In this same Motion to Strike [Doc. # 245], the City also objects to the submission of some of the FTU Plaintiff's interrogatories and the City's responses to those interrogatories, Exhibits 31 and 32 to Appendix to FTU's Locational Response [Doc. # 223], as irrelevant. The FTU Plaintiffs submitted these exhibits in an effort to demonstrate to the Court why they request further time for discovery. Since the Court

(Continued on following page)

For the reasons discussed above, because the City failed to justify either of the two increased distance requirements in Ordinance 97-75 with specific reference to negative secondary effects caused by sexually oriented businesses or to evidence that or to analysis concluding that the prior distance requirements did not adequately address those effects, the Court holds that these increased distance requirements are not content-neutral. Thus, with respect to constitutionally protected businesses, these increased distance requirements must be reviewed under strict scrutiny.

The Court's conclusion that the City has failed to show that the Ordinance's new distance requirements were enacted in a content-neutral manner is not a *per se* ruling that the City cannot revise its previously enacted distance requirements. The City could have validly increased the distances if it had first, in some way, tied these increases to evidence in the legislative record demonstrating that, or at least supported them with some rationale as to why, the earlier distance requirements did not adequately address the negative secondary effects previously found to exist. However, the record before this Court contains no evidence, nor even discussion by City Council members, that sexually oriented businesses have a negative impact on protected land uses located more than 750 and less than 1,500 feet away, or located on residential areas located

---

is denying requests for further discovery, the City's Motion to Strike these exhibits is **DENIED AS MOOT**.

The City also objects to the FTU Plaintiffs' submission of pretrial conference transcript excerpts as irrelevant. These excerpts were provided as a courtesy to the Court to illustrate various points made in Plaintiffs' briefing. The City's Motion to Strike these excerpts [Doc. # 245] is therefore **DENIED**.

within a radius of between 1,000 and 1,500 feet. Nor does the record even contain any useful evidence or discussion regarding whether, since the time the previous distance requirements were adopted, sexually oriented businesses have continued to exert specific negative secondary effects, such as decreased property values, increased drug use, prostitution, or other crime, on surrounding areas.

ii. Conclusion as to Validity of Increased Distance Requirements for Protected Businesses

Since the Court has determined that the increased distance requirements for constitutionally protected businesses contained in Ordinance 97-75 must be evaluated under strict scrutiny, these requirements may only be upheld for protected businesses if the City demonstrates that compelling reasons justify their enactment. As described in the previous section, the legislative record contains no specific evidence showing a need for increased distance requirements to combat negative secondary effects caused by adult businesses. The Court therefore concludes that these provisions may not be enforced against businesses that are protected by the First Amendment to the United States Constitution.[121]

---

[121] Because of the Court's conclusion that the Ordinance's new 1,500 foot distance requirements were enacted in an impermissible content-based manner, it need not consider the parties' arguments regarding whether these new requirements would allow an adequate number of alternative sites to which Plaintiffs could relocate their businesses. However, the Court notes a significant problem in the legislative record with respect to these new distance requirements, in the event the City attempts to enact a similar measure in the future. In deciding to recommend the increased distance requirements to the full

(Continued on following page)

In the alternative, even if the Court should evaluate these restrictions under intermediate scrutiny, the Court concludes that they are invalid because the City has failed to demonstrate that they serve substantial governmental interests.[122]

Council, the Committee specifically relied on evidence presented by Joseph Chow, from the City's Planning Department, which suggested that the new locational restrictions under consideration would still allow more than 7,000 alternative sites to which sexually oriented businesses could legally operate within the City. The City's Legal Department and the Committee concluded that this number would be far more than adequate to accommodate all existing sexually oriented businesses, since only about 120 of these businesses currently exist in the City. *See, e.g.*, Transcript of November 20, 1996, Committee Meeting, Exhibit 15C to City's Motion [Doc. # 120], at 49. However, the calculations that created the estimate that more than 7,000 sites would be available does not in any way take into account the spacing requirement in the Ordinance, § 28-125(b)(2), which prohibits (with limited exceptions) sexually oriented businesses from operating within 1,000 feet of each other. It appears patently clear that factoring in the spacing requirement would likely diminish substantially the number of sites at which sexually oriented businesses could simultaneously operate. *See Woodall*, 49 F.3d at 1125 ("[w]here a zoning ordinance requires that adult businesses maintain a certain distance from one another, merely knowing the number of acres available is not particularly enlightening. . . . What is important is the number of adult business locations that the acreage will support given the spacing requirements."). In the Committee's extensive deliberations regarding alternative sites, not one person ever mentioned this issue. Because of the spacing requirement, the Court believes that a reasonable City Council member should *not* have concluded that the new restrictions would actually allow space for more than 7,000 adult businesses in the City.

[122] The Court reaches this alternative conclusion out of an abundance of caution because the Fifth Circuit has noted that there is uncertainty in First Amendment doctrine regarding whether content-based restrictions on commercial speech should receive intermediate or strict scrutiny. *See MD II Entertainment*, 28 F.3d at 495. If content-based restrictions on commercial speech are afforded only intermediate scrutiny, then, because adult entertainment enjoys less constitutional protection than other forms of speech, it would logically follow that

(Continued on following page)

b. Public Parks

i. Content-Based or Content-Neutral?

In contrast to the increased distance requirements discussed in the previous section, the Court finds that the legislative record contains adequate content-neutral justification for the City's decision to add public parks to the list of protected land uses from which adult businesses may not locate closer than 750 feet. Specifically, the City Council's Sexually Oriented Business Committee heard evidence regarding the impact of having sexually oriented businesses located near public parks, and Committee members specifically discussed their concerns about having lewd behavior or other crimes spill over from the businesses to nearby parks which are used for family recreation. *See* Minutes for November 4, 1996, Committee Meeting, Exhibit 14B to City's Motion [Doc. # 120], at 3 (Boney stated that parks should be added to list of protected land uses because "there are children [in the parks] who would be unprotected and unsupervised"), 7-9 (representative from City Parks department spoke about the possibility of prostitution and drugs from sexually oriented businesses spilling over into parks and stated that harassment of children walking by sexually oriented businesses

---

content-based restrictions on adult entertainment could not be subject to more than intermediate scrutiny. However, this conclusion appears to contradict the Supreme Court's holding in *City of Renton* that, even in the context of adult entertainment, "regulations enacted for the purpose of restraining speech on the basis of its content presumptively violate the First Amendment," 475 U.S. at 46-47, 106 S.Ct. 925.

inhibits some children from coming to parks located near these businesses).[123]

The Court finds this legislative evidence in support of adding public parks to the list of protected land uses to be exceedingly slim, but it is sufficiently specific to render this amendment to the Ordinance content-neutral. The Committee did not receive any firsthand or empirical evidence indicating that sexually oriented businesses actually impose negative secondary effects on public parks in Houston; nor did the Committee examine any studies from other cities regarding public parks. However, since negative secondary effects of some sort have been generally shown over the years to exist in areas immediately surrounding sexually oriented businesses (based on the legislative records for previous versions of the Ordinance and based on the Fifth Circuit's conclusions in *SDJ*), the Court holds that this new testimony and discussion regarding public parks is sufficient – although only marginally – to justify the City's addition of this category of protected land uses to the Ordinance's locational restrictions. In other words, the Court concludes that a City Council member could have reasonably relied upon the combination of previously adduced evidence and the Committee's new discussion of the issue to conclude that the City had the same interest in protecting public parks

[123] The Committee also heard testimony from a City resident, who was the chair of local park advisory council, describing the improvements the City has made to public parks in recent years and noting that families and unattended children have been using public parks more often than in the past. *See* Minutes for November 4, 1996, Committee Meeting, Exhibit 14B to City's Motion [Doc. # 120], at 7 (testimony of Marcia Olivares).

that it had in protecting schools, churches, daycare centers, and residential areas. [124]

Because the addition of public parks to the Ordinance's list of protected land uses was justified with specific reference to negative secondary effects and to evidence that the previous version of the Ordinance was not adequately addressing those effects near public parks, the Court finds that this addition is content-neutral and thus should be reviewed under intermediate scrutiny.

ii. Narrowly Tailored to Serve Substantial Governmental Interests?

The Court concludes that the Ordinance's addition of public parks to the list of protected land uses is narrowly tailored to serve a substantial governmental interest. The inherent similarity between public parks and schools makes the locational restrictions with respect to public parks just as reasonable and sufficiently well-tailored as those restrictions are with respect to schools.

iii Alternative Avenues of Communication

Based on the evidence contained in the current record, the Court concludes that, although the addition of public parks to the list of protected land uses may require some

---

[124] Thus, the Committee specifically considered why the previous list of protected land uses was not sufficient to alleviate problems the Ordinance was intended to address. In contrast, as discussed in the previous section, the record does not contain any specific discussion regarding why the Ordinance's prior distance requirements needed to be amended.

sexually oriented businesses to close or relocate, this new restriction will not significantly reduce the number of sites available in Houston for sexually oriented businesses. Specifically, at one Sexually Oriented Business Committee meeting, a representative from the City's Planning Department estimated that the addition of parks to the list of protected land uses would eliminate only 1,000 out of roughly 19,000 potential sites for sexually oriented businesses. *See* Transcript of October 23, 1996, Committee Meeting, Exhibit 12D to City's Motion [Doc. # 120], at 15.

Thus, although the question of whether a regulation which restricts permissible locations for sexually oriented businesses allows a sufficient number of alternate sites appears ordinarily to be a question of fact, *see, e.g., Woodall,* 49 F.3d at 1124, the Court concludes that in this case, no genuine issue of *material* fact exists which would necessitate a trial on this issue. Plaintiffs have not argued, and this Court does not find, that the enforcement of this new locational restriction would, on its own, reduce the number of alternative available sites significantly enough to prevent those businesses that will have to close or move from finding new locations.

iv. Conclusion as to Validity of New Provision Regarding Public Parks

As indicated by the preceding analysis, the Court concludes that the new provision in Ordinance 97-75 that adds public parks to the list of protected land uses near which sexually oriented businesses may not locate is sustainable under the intermediate scrutiny test. This provision is therefore valid under the First Amendment to the United States Constitution.

c. Multifamily Dwellings

i. Content-Based or Content-Neutral?

As with the Ordinance's new provision regarding public parks, the Court finds sufficient content-neutral justification in the legislative record for the Committee's decision to revise the method by which multifamily dwellings are factored into the calculation of whether an area surrounding a sexually oriented business is residential. Specifically, the Committee heard evidence that the formula contained in the prior version of the Ordinance for calculating whether an area is residential did not adequately take measure of the true nature of an area. The Committee determined that this shortcoming existed because multifamily dwellings, including large apartment complexes, were treated under the prior formula as though they held only one family each. In the Committee meetings, the Legal Department discussed with Council members that it had encountered a problem under the prior Ordinance in that the City does not protect residents in condominiums, apartment buildings, and town homes equally with those in single family residences. *See* Minutes for July 15, 1996, Committee Meeting, Exhibit 3D to City's Motion [Doc. # 120], at 3; Minutes for October 3, 1996, Committee Meeting, Exhibit 10B to City's Motion, at 8. Thus, the record contains specific evidence that the City enacted this amendment with the purpose of merely refining, or clarifying, what it had earlier intended to achieve, in 1983 and 1986, by prohibiting sexually oriented businesses from locating in residential areas.

ii. Narrowly Tailored to Serve Substantial Governmental Interests?

The Court finds that the new formula for multifamily dwellings is sufficiently well-tailored to achieve the specific purpose for which the City originally adopted its restriction on the location of sexually oriented businesses in residential areas. As described above, it appears that the new formula merely clarifies what the City earlier intended to mean by a "residential area."

The Court therefore concludes that the new provision in Ordinance 97-75 that revises the formula for determining whether an area is residential to give greater weight to multifamily dwellings meets the constitutional requirement that a restriction on protected businesses be narrowly tailored to serve substantial governmental interests.

iii. Alternative Avenues of Communication

The current record, however, contains no evidence whatsoever by which the Court could estimate how many sites will become unavailable for adult businesses under the new formula for calculating residential areas. With respect to public parks, the legislative record at least contains a rough estimate that persuades the Court that there is no genuine issue of material fact here regarding whether the addition of public parks to the list of protected land uses will significantly affect the number of available sites for protected businesses. However, with respect to the new formula for multifamily dwellings, the Court currently has no information before it that would allow the entry of summary judgment on this issue.

Plaintiffs' challenge to the Ordinance's new locational restrictions have exclusively focused on the number of sites that would be available if *all* of the new locational restrictions contained in Ordinance 97-75 were enforced. The parties thus have not dissected for the Court what impact the new formula for multifamily dwellings would have alone, if implemented separately from the Ordinance's other new locational restrictions.

Plaintiffs have placed most of their emphasis on their challenge to the Ordinance's new 1,500 foot minimum distance between adult businesses and protected land uses. It appears that Plaintiffs have attacked this provision most strongly because it is the restriction that would have the most substantial impact on the City's adult businesses and would apparently force a majority of the businesses to close or relocate. However, because the Court has found the 1,500 foot distance requirement to be constitutionally invalid on the ground that it is a content-based restriction, and thus unenforceable for the protected businesses, it is unclear how significant the issue of alternative avenues of communication remains in this case.

Thus, the Court will allow the parties opportunity for further briefing on the limited issue of what impact the new formula accounting for multifamily dwellings will have on protected adult businesses. Within ten business days from entry of this Order, the City shall submit a memorandum of law on the issue of alternative avenues of communication with specific reference to the multifamily dwelling provision of the Ordinance. The City shall also submit an affidavit by an individual with knowledge of this issue regarding how the City expects that the new formula for multifamily dwellings will affect the Plaintiffs

in this action. Plaintiffs will have ten days to file a responsive memorandum and other materials they deem necessary. In their memoranda, the parties are specifically directed to indicate to the Court what factual evidence currently exists regarding the potential impact of this provision and, if this evidence is now lacking, what measures would need to be taken to produce such evidence.[125]

iv. Conclusion as to Validity of New Formula Regarding Multifamily Dwellings

For the reasons discussed above, the Court concludes that the Ordinance's new formula which assigns greater weight to multifamily dwellings in its calculation of residential areas is content-neutral and narrowly tailored to serve substantial governmental interests. It is therefore

---

[125] On July 1, 1997, the Court entered an Order regarding what burden of proof would apply in this case to the issue of alternative avenues of communication. Following entry of that Order, the FTU Plaintiffs filed a Motion for Reconsideration [Doc. # 138]. The Court has considered this Motion, the City's Response [Doc. # 186], and FTU's Reply [Doc. # 199], and is unpersuaded that its July 1st ruling was in error. The Court therefore reaffirms its earlier ruling regarding the burden of proof and **DENIES** FTU's Motion for Reconsideration [Doc. # 138]. The Court will issue a more detailed order on this issue at a later date if it becomes necessary to hold a trial on whether the new multifamily dwelling formula allows a sufficient number of alternative sites for the affected businesses.

The parties have filed several motions to strike evidence regarding the issue of alternative avenues of communication. Because this evidence was submitted to provide support for the parties' arguments with respect to whether the implementation of *all* of the Ordinance's new locational restrictions would allow a sufficient number of alternative sites, the Court has not needed to consider this evidence. These Motions to Strike [Docs. # 245, 252, 266] are therefore **DENIED AS MOOT**.

constitutionally valid so long as implementation of this formula will still allow a sufficient number of permissible sites for affected protected businesses. However, the Court will not make a final ruling on the formula's validity at this time because it does not have any evidence before it regarding the number of sites that will be available if the formula is implemented.

C. *Amortization*

Plaintiffs contend that, if the Court upholds provisions of Ordinance 97-75 which will cause sexually oriented businesses to lose substantial sums of money by requiring them to close, relocate, or undertake substantial interior renovations, then the Ordinance is invalid because it does not provide for adequate amortization for the affected businesses. *See* N.W. Enterprises' Response [Doc. # 151], at 16-21, 25-26; Dee & Dee's Response [Doc. # 178], at 42-45. Plaintiffs have primarily framed their arguments regarding amortization based on the contingency that the Court upholds the Ordinance's locational restrictions in full. Because the Court has found the new distance requirements to be invalid for protected businesses, fewer Plaintiffs will be affected by the new locational restrictions than the parties apparently expected when they briefed the amortization issue. However, because *some* protected businesses will most likely have to close or relocate, as a result of the Court's partial upholding of the Ordinance's new locational restrictions, the Court must nevertheless address Plaintiffs' arguments regarding amortization.[126]

---

[126] These businesses include those that are located within 750 feet of a public park and, depending on the outcome of the issue regarding

(Continued on following page)

In *SDJ,* the district court described amortization as one of three methods that a city may employ, when implementing new land use restrictions, to immunize itself from constitutional takings claims. *See SDJ,* 636 F.Supp. at 1370.[127] However, on appeal, the Fifth Circuit peremptorily disposed of this issue by holding that Ordinance 86-323 could not constitute a taking because "the Ordinance . . . does not prevent all reasonable uses of plaintiff's property." *SDJ,* 837 F.2d at 1278 (citing *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, Cal.,* 482 U.S. 304, 321, 107 S.Ct. 2378, 96 L.Ed.2d 250 (1987)).[128] This Court likewise concludes that Ordinance 97-75 cannot be a taking. Ordinance 97-75 does not prevent all reasonable uses of Plaintiffs' property. If Plaintiffs wish to avoid all the restrictions imposed by Ordinance 97-75, they could do so by converting their businesses into non-sexually oriented businesses.

---

the new formula for multifamily dwellings, may also include those that are within a 1,000 foot radius of a residential area, as calculated under the new formula. The amortization provisions might also affect those businesses that the Court has determined are not protected by the First Amendment.

[127] According to the court, "[o]ne [method] is to include a grandfather clause exempting existing businesses, the second method is to compensate owners for the taking of their property, and the third is to amortize the value of the property over a period of time." *SDJ,* 636 F.Supp. at 1370.

[128] The N.W. Enterprises Plaintiffs asserted that "[t]he Fifth Circuit held that with adequate amortization provisions there is no taking." N.W. Enterprises' Response [Doc. # 151], at 17-18 (citing *SDJ,* 837 F.2d at 1278). The Fifth Circuit, however, did not actually hold that adequate amortization provisions are necessary at all; instead, it rejected the *SDJ* plaintiffs' argument regarding the adequacy of the Ordinance's amortization provision on the more preliminary ground that the Ordinance cannot be a taking because it does not prevent all reasonable uses of Plaintiffs' property. *See SDJ,* 837 F.2d at 1278.

However, in light of the parties' more detailed arguments regarding the sufficiency of the amortization provisions of Ordinance 97-75, and following the example of the district courts in both *SDJ* and *4330 Richmond,* which carefully considered the amortization provisions in the earlier versions of the Ordinance,[129] this Court will address Plaintiffs' claims regarding amortization.

The N.W. Enterprises Plaintiffs challenge the Ordinance's amortization provision on several grounds. First, they contend that the provision, contained in § 8(c) of the Ordinance, is facially unconstitutional as a prior restraint because it fails to provide adequate guidelines for granting amortization extensions. Second, they claim that it fails to provide adequate time limits on the amortization decisionmaker. Third, they argue that the amortization issue should not be decided through summary judgment because whether or not the Ordinance allows adequate amortization is a question of fact. Finally, they argue that, although § 8(c) provides for amortization for other types of sexually oriented businesses, the Ordinance contains no amortization provision whatsoever for adult arcades and minitheatres. *See* N.W. Enterprises' Response [Doc. # 151], at 16-17.

The Dee & Dee Plaintiffs challenge the adequacy of amortization under the Ordinance on different grounds.

---

[129] *See 4330 Richmond,* No. 91-0665, slip. op. at 26-27; *SDJ,* 636 F.Supp. at 1370-71. In *SDJ,* the district court held that "[a]n Ordinance which terminates, over time, preexisting nonconforming uses should be carefully scrutinized where first amendment interests are affected. Under any set of factors, the standard for amortizing a particular use must be reasonable and must satisfy the concerns of due process." *Id.* at 1370 (citations omitted).

First, they contend that Ordinance 97-75 does not provide amortization for those businesses that, at the time of the Ordinance's passage, were challenging Ordinance No. 91-187 in *4330 Richmond* and thus did not hold valid permits under the prior version of the Ordinance. Second, they argue that the amortization provisions of Ordinance 97-75 are inadequate because under relevant takings law, owners are entitled to the market value of their businesses at the time of the Ordinance's passage, whereas the Ordinance's amortization provisions consider only whether the owners have recouped their business investment. *See* Dee & Dee's Response [Doc. # 178], at 42-44.

Finally, the FTU Plaintiffs argue that the Ordinance provides a shorter amortization period than the City allows for other kinds of businesses subject to municipal regulation.

The Court addresses each of these arguments in the same order as they have just been described. For the following reasons, the Court rejects all of Plaintiffs' arguments that Ordinance 97-75 is in any way invalid on the basis of its amortization provisions.

1. Guidelines for Providing Amortization Extensions

Pursuant to § 8 of Ordinance 97-75, sexually oriented businesses were given 180 days from the date on which the Ordinance was passed, January 15, 1997, in which to conform to the new locational and structural requirements contained in Article III. The City enacted this section in order "to provide an initial period for recoupment of investment." Ordinance 97-75, § 8(a). Businesses that could not recoup their investments in this period of time

were permitted to apply for extensions under § 8(c).[130] In applying for an extension, a business was required to supply to the amortization hearing officer evidence of four items of information set forth in § 8(c).[131]

The N.W. Enterprises Plaintiffs first contend that § 8(c) is facially inadequate because it contains no guidelines setting forth precisely how the hearing officer should determine whether a business will be able to recoup its investment within the initial 180 day period, and thus whether the business is eligible for an extension, nor any criteria for determining how long of an extension a business should receive if one is granted.

---

[130] According to the FTU Plaintiffs, 52 adult businesses sought amortization extensions under this provision, and all were denied except for one. *See* FTU's Response [Doc. # 170], at 16-17 (citing Stipulation No. 1, contained within Defendant City of Houston's Stipulation Regarding Certain Matters and Documents [Doc. # 143]). However, because the City has agreed to a standstill arrangement in which it is not enforcing the Ordinance pending the Court's consideration of the summary judgment motions, this 180 day period has, as a practical matter, been extended for all parties to the lawsuit. As of the date of this Order, all Plaintiffs have already had a *de facto* amortization period of more than one year.

[131] These items of information include the following:

> (1) The amount of the owner's investment in the existing enterprise through the date of passage and approval of the Ordinance;
>
> (2) The amount of such investment that has been or will be realized through the effective date;
>
> (3) The life expectancy of the existing enterprise;
>
> (4) The existence or nonexistence of lease obligations, as well as any contingency clauses therein permitting termination of such lease.

Ordinance 97-75, § 8(c).

As for the length of the extension if one is granted, the Court rejects Plaintiffs' contention that § 8(c) does not provide sufficient guidance to the decisionmaker. In *4330 Richmond,* Judge Rainey recently upheld the 1991 amortization extension provision, which was practically identical to § 8(c), explaining that:

> The Ordinance cites to specific information an enterprise must provide; by including that information, it is necessarily implied that the Director, or his designee, will rely on that information in determining whether to grant an extension. Therefore, the amortization provisions do not provide the Director with standardless discretion.

4330 Richmond, No. 91-0665, slip. op. at 27. Similarly, with regard to Plaintiffs' challenge here, this Court concludes that the new Ordinance's requirement that businesses applying for extensions submit information regarding their investment establishes that the hearing officer will rely on that information in determining the length of an extension if one is needed. Ordinance 97-75 therefore provides sufficient guidance with respect to the length of extensions.

As for the hearing officer's determination of whether a business is even eligible for an extension, the N.W. Enterprises Plaintiffs point out that, although in applying for an extension a business must submit evidence regarding the amount of its investment and the realization of that investment, the Ordinance provides no definitions for the terms "investment" and "realize." In *SDJ,* however, the district court rejected this same argument which the plaintiff businesses made with respect to an amortization extension provision in the 1986 version of the Ordinance

that utilized the same terminology as Ordinance 97-75. The court there found that the Ordinance's amortization period and extension process were reasonable even though the Ordinance did not provide a precise definition for the term in issue. *See SDJ,* 636 F.Supp. at 1370. The court determined that, in the absence of a more specific definition, a plain meaning definition of the term would apply and would provide adequate guidance to the decisionmaker. This Court agrees. The drafters of Ordinance 97-75 envisioned that the amortization decisionmaker would apply the ordinary definitions of the terms "investment" and "realize." These terms have technical meanings in law and accounting that are sufficiently specific to provide adequate guidance to the decisionmaker. The Court therefore rejects Plaintiffs' contention that these terms provide the decisionmaker with too much discretion.[132]

Therefore, the Court rejects Plaintiffs' argument that the amortization extension provision, § 8(c) of Ordinance 97-75, is facially invalid for not providing sufficient guidance to the decisionmaker.[133]

---

[132] Moreover, Plaintiffs' argument here also fails because Ordinance 97-75 provides even *less* discretion to the amortization decisionmaker than the 1986 version of the Ordinance, which was upheld in *SDJ.* Ordinance 97-75 states, in mandatory terms, that "[t]he director *shall* grant an extension for the continued operation of the enterprise in the event that the owner proves that he will be unable to recoup his investment in the business," Ordinance 97-75, § 8(c) (emphasis added), whereas Ordinance 86-323 provided only that "the Director '*may,* in his discretion, grant an extension . . . if the owner . . . proves that he is unable to recoup his investment,'" *SDJ,* 636 F.Supp. at 1370 (quoting Ordinance 86-323, § 5(c)).

[133] In any event, the Plaintiffs who disagree with the hearing officer's determination have a fair review process involving the state courts.

2. Time Limits on Amortization Decisionmaker

The N.W. Enterprises Plaintiffs also argue that § 8(c) is facially invalid because it does not provide a maximum time period within which the decisionmaker must provide to an applicant a hearing or must render a decision regarding whether the applicant will receive an amortization extension. In support of this argument, Plaintiffs rely primarily on *FW/PBS,* 493 U.S. at 227, 110 S.Ct. 596, in which the Supreme Court struck down the Dallas adult business ordinance as unconstitutional because it failed to provide limitations on the time within which a licensor's decision must be made.

Although Ordinance 97-75 does not set out specific deadlines for scheduling amortization hearings or issuing decisions, Plaintiffs lack standing to raise this argument. All of the amortization hearings that were requested have already been held, either prior to the effective date of the Ordinance or shortly thereafter, and it appears that many, if not all, rulings have been issued. Thus, to this extent, Plaintiffs' argument regarding the lack of time limits for hearings and obtaining initial determinations appears to be moot.[134]

Even if some Plaintiffs have not yet received an initial administrative decision regarding their applications for amortization extensions, the Court finds Plaintiffs' comparison to the ordinance invalidated in *FW/PBS* unavailing. In

---

[134] In addition, because the Court has invalidated the Ordinance's new 1,500 foot distance requirements for protected businesses and therefore, under this Court's Order, many Plaintiffs will not have to relocate, many of these amortization hearings may now be moot.

that case, the decisionmaker was given no time limitations within which to grant or withhold licenses allowing the plaintiffs to engage in constitutionally protected speech. *See FW/PBS,* 493 U.S. at 227, 110 S.Ct. 596 (stating that the amortization scheme at issue permitted the "indefinite postponement of the issuance of the license"). During the period in which those plaintiffs were waiting for a final decision, their speech was restricted. *See id.* In contrast, here, the amortization provision of Ordinance 97-75 merely neglects to provide a time limitation on the decision of whether a business should have an *extended period of time* within which to comply with the new locational restrictions. So long as Plaintiffs' businesses are not closed for failure to comply with the Ordinance while awaiting a final decision on their extension applications, their speech is not restricted pending the decisionmaker's consideration of their applications, and there is no constitutional infirmity with the challenged provision.

The N.W. Enterprises Plaintiffs also argue that § 8 of the Ordinance is unconstitutional because it does not provide a time certain for appeals of amortization rulings. *See* N.W. Enterprises' Cross-Motion [Doc. # 268], at 7-8. Section 8 incorporates by reference the procedures set forth in § 28-135, which provide for judicial review by way of writ of mandamus or other available remedy in a court of competent jurisdiction. *See* § 28-135(a). Section 28-135(b) provides that "[t]he person aggrieved by the decision of the city may seek judicial review of such decision immediately following the decision." Plaintiffs contend that the word "immediately" in this section is unconstitutionally vague, noting that the City suggested at the October 17th pretrial conference that "immediately" could mean anything from one day to thirty days. Plaintiffs

claim that the City can construe the procedures of § 28-135 in its favor and therefore this provision generally is also unconstitutionally vague.

In response, the City argues that the term "immediately" is not unconstitutionally vague because *FW/PBS* merely requires that the opportunity for judicial review be "prompt." The City also requests that the Court take judicial notice of the fact that the City has consistently sought expedited resolution of all of Plaintiffs' complaints and that it is Plaintiffs who have sought delays. *See* City's Response to N.W. Enterprises' Cross-Motion [Doc. # 302], at 7.

The Court rejects Plaintiffs' vagueness argument. The term "immediately" in § 28-135(b) permits appeal by an applicant without delay for a period before which an order of denial becomes final. In addition, § 28-135(c) establishes for an aggrieved applicant various rights associated with reasonable time frames, including a 60 day stay of enforcement if the applicant initiates litigation protesting a denial within 20 days of its issuance. These provisions sufficiently protect the rights of aggrieved applicants. The Court simply finds no merit to the N.W. Enterprises' arguments regarding the sufficiency of the time limits on the amortization decisions and appeals.

3. Adequacy of Amortization

The N.W. Enterprises Plaintiffs also contend that summary judgment on the issue of amortization is inappropriate because the issue of whether or not Ordinance 97-75 provides adequate amortization is a factual question. In contrast, the City argues that the amortization provision, § 8 of the Ordinance, is adequate as a matter of

law because it is virtually identical to the provisions that were upheld in *SDJ* and *4330 Richmond.*

In both *SDJ* and *4330 Richmond,* the district courts determined that the six month amortization period, plus the possibility of extensions, contained in the City's prior ordinances was constitutionally sufficient. However, in making this determination, both courts specifically noted that the plaintiffs in those cases presented no evidence that they were unable to recoup their investments within six months. *See 4330 Richmond,* No. 91-0665, slip. op. at 27; *SDJ,* 636 F.Supp. at 1371. In this case, Plaintiffs contend that they should have the opportunity to present such factual evidence.[135]

While the Court agrees with Plaintiffs' argument that the adequacy of amortization may be a fact issue under the district court decisions in *SDJ* and 4330 *Richmond,* under the Fifth Circuit's opinion in *SDJ,* the Ordinance does not even raise a constitutional takings issue at all. *See* 837 F.2d at 1278. Therefore, under the appellate law that binds this Court, Plaintiffs simply lack a legally viable challenge to the adequacy of amortization under the Ordinance as a taking.

---

[135] In fact, the N.W. Enterprises Plaintiffs have already submitted certified copies of amortization decisions and affidavits purporting to show their lost investments, restructuring costs, and inadequacy of the amortization provisions. *See* Affidavit of Steve Sewell, Attachment to N.W. Enterprises' Cross-Motion [Doc. # 268].

4. Amortization for Adult Arcades and Mini-Theatres

Finally, the N.W. Enterprises Plaintiffs argue that, even if the amortization provision contained in § 8 of Ordinance 97-75 is adequate to address the problems created for businesses that must close or relocate under the new locational restrictions of Article III (which apply to all sexually oriented businesses in the City), the Ordinance is nevertheless invalid in that it does not provide any amortization for adult arcades and mini-theatres that are affected by costly new structural regulations under Article II. *See* N.W. Enterprises' Cross-Motion [Doc. # 268], at 526. Plaintiffs are correct that the amortization provisions contained in § 8 of Ordinance 97-75 apply only to businesses affected by the new regulations that the Ordinance adds to Article III and not to businesses that are only affected by the amendments to Article II.

However, as the City points out, Plaintiffs' argument ignores § 7 of the Ordinance, which specifically governs amortization for adult arcades and mini-theatres. Section 7 provides that these businesses have 120 days after the passage date of the Ordinance until they must be in compliance with the new Article II regulations and that they may receive a 30 day extension beyond that in order to perform any remodeling that may be necessary. The City argues that adult arcades and mini-theatres that are not being forced to close or relocate do not need the more elaborate amortization protections of § 8 because the new Article II regulations only require interior construction work. To the extent that any adult arcades and mini-theatres must close or relocate under the new locational restrictions in Article III, these businesses are protected by the more elaborate § 8 amortization provisions.

The Court therefore concludes that Ordinance 97-75 provides sufficient amortization for adult arcades and mini-theatres. The City's choices as to amortization in this regard are clearly within its prerogative, especially in light of the Fifth Circuit's holding in *SDJ* that this type of regulation simply raises no takings issue.

5. Amortization for Plaintiffs in *4330 Richmond*

Section 8 of Ordinance 97-75 only permits amortization for businesses which, at the time of the Ordinance's passage, held valid permits under the previous version of the Ordinance. Thus, the Dee & Dee Plaintiffs argue that the Ordinance constitutes a taking for those businesses that challenged the validity of the previous version of the Ordinance in court. Because of the challenge raised in *4330 Richmond,* a number of businesses were not, at the time Ordinance 97-75 was passed, in compliance with Ordinance 91-187. The Dee & Dee Plaintiffs claim that the exclusion of these businesses from the amortization provisions of Ordinance 97-75 punishes them for having been plaintiffs in *4330 Richmond.*[136]

The Court rejects this argument. In *4330 Richmond,* Judge Rainey upheld the locational provisions of Ordinance 91-187. If that decision is affirmed on appeal, then the affected businesses will have had an enormously long *de facto* amortization period under Ordinance 91-187 – the seven years since that ordinance was passed plus the

[136] The Dee & Dee Plaintiffs raise this argument only on behalf of Hi-Houston, Inc. and Charles Wesley, who are apparently also plaintiffs in *4330 Richmond*. *See* Dee & Dee's Response [Doc. # 178], at 43.

period during which the *4330 Richmond* decision remains on appeal. That period is obviously constitutionally adequate. *Cf. SDJ,* 636 F.Supp. at 1371 ("preexisting nonconforming uses are not to be perpetual"). If Ordinance 91-187 is upheld, and thus the courts have determined that the City acted lawfully when it enacted Ordinance 91-187, then there would be no basis for the Dee & Dee Plaintiffs' complaint that businesses affected by Ordinance 91-187 should be entitled to even *more* time to recoup their investments simply because the City chose to enact yet another Ordinance.

The Dee & Dee Plaintiffs' argument makes sense only in the unlikely event that some businesses are not affected by Ordinance 91-187 because the district court's decision in *4330 Richmond* is reversed (and as a result, the locational restrictions in Ordinance 91-187 are struck down) but that those businesses are affected by the locational restrictions that are upheld in Ordinance 97-75. This Court need not address these circumstances until and unless they in fact occur.

6. Measure of Compensation

The Dee & Dee Plaintiffs also argue that the amortization scheme included in Ordinance 97-75 is inadequate because it does not allow owners the opportunity to recoup the "market value of the interest taken" at the time of the taking. *See* Dee & Dee's Response [Doc. # 178], at 44-45 (citing *Almota Farmers Elevator & Warehouse Co. v. United States,* 409 U.S. 470, 93 S.Ct. 791, 35 L.Ed.2d 1 (1973)). The Court rejects this argument.

The Court is unpersuaded by Plaintiff's citation to a 25 year-old Supreme Court case arising in a completely

unrelated context. Instead, the Court is bound by the Fifth Circuit's decision in *SDJ* that this type of Ordinance simply does not constitute a taking. In any event, the district court, which gave more detailed review to the parties' arguments regarding amortization, also held that there was no taking where the amortization scheme, practically identical to the one challenged here, only compensated for an owner's "investment" in the business. *See SDJ,* 636 F.Supp. at 1370-71. *Accord, 4330 Richmond,* No. 91-0665, slip. op. at 26-27.[137]

The Court does not need to reach the Dee & Dee Plaintiffs' contention that summary judgment is precluded because there is a genuine issue of material fact concerning what the actual values of Plaintiffs' businesses were before the passage of the Ordinance. Even if such specific calculations were necessary, they would be properly made in the amortization hearings and appeals of those hearings. To the extent that Plaintiffs argue that the hearings and administrative appeals process are nonetheless inadequate, the Court has addressed this issue *supra* in Section V.C.3., in response to the N.W. Enterprises Plaintiffs' allegations of insufficient amortization procedures.

---

[137] The Dee & Dee Plaintiffs also contend that they are not claiming a taking of their interest in the real property upon which their businesses are located, but instead claim a taking of "their property right in the established, ongoing businesses themselves." Dee & Dee's Response [Doc. # 178], at 43-44. In *SDJ,* however, the Fifth Circuit did not specifically limit its rejection of the plaintiffs' takings argument to claims involving real property, as opposed to the "going concern" value of the businesses on that real property. The Fifth Circuit concluded simply that the Ordinance did not prevent all reasonable uses of plaintiff's property. *See SDJ,* 837 F.2d at 1278.

7. Length of Amortization Period

Finally, the FTU Plaintiffs argue that Ordinance 97-75 provides inadequate amortization because 180 days is a shorter amortization period than the City allows for other kinds of regulated businesses. *See* FTU's Locational Response [Doc. # 221], at 66-68. The FTU Plaintiffs have not submitted evidence in support of this claim, but instead request further opportunity for discovery to confirm this suspicion. There is no valid justification for the FTU Plaintiffs' delay in submission of such material, since it is presumably a matter of statute or ordinance and is publicly available without discovery.

In any event, the Court will not reach this argument because Plaintiffs do not have standing to raise it. Because of the current standstill, pending the disposition of the summary judgment motions, no Plaintiffs have been required to comply with the Ordinance's new locational restrictions. Effectively, they have all received, so far, more than a six month extension beyond the 180 day period provided by § 8 of the Ordinance. In any event, the Ordinance's six month amortization period does not appear constitutionally infirm.

D. *Notice Provision*

The Dee & Dee Plaintiffs argue that the City has advanced no substantial governmental interest behind the new requirement in Ordinance 97-75 that a sexually oriented business applying for a license in a new location must place a notice warning the community of the application.[138]

---

[138] Section 28-123(f) provides that:

> Every applicant shall give notice of the application by publication at his own expense in two consecutive issues of a

(Continued on following page)

See Dee & Dee's Response [Doc. # 178], at 59. According to these Plaintiffs, the City has no legitimate interest in this requirement since the public's input cannot have an effect on whether a license is granted or denied. The Court rejects this argument. The City Council based this provision upon a reasonable content-neutral determination that community residents would like to have advance warning before new adult businesses enter their neighborhoods, even if they have no legal means for preventing such openings. In *TK's Video,* the Fifth Circuit upheld such a notice requirement as sufficiently well-tailored to achieve a substantial government interest. There, the court explained:

> An applicant requesting a license must post a sign on the business premises disclosing his request. . . . The . . . notice provisions . . . ensure that potential neighbors know about the impending arrival of adult businesses. Notice to others . . . is supported by a substantial state interest, serving the practical role of allowing effected [sic] persons an opportunity to examine the request and test its accuracy. These notice requirements are not onerous. . . . We are persuaded that the

---

newspaper published in Houston, Texas with a daily circulation of not less than 100,000 copies. The notice shall be printed in 10-point boldface types and shall include: (1) the fact that a sexually oriented business permit has been applied for; (2) the street address, including suite or unit number, if any, of the place of business for which the permit is sought; (3) the names of the business and, if the business is operated under an assumed name, the trade name, and (4) if the applicant is a corporation, the names and titles of all officers. The notices shall be published within seven (7) days after the application is filed with the director.

> notice requirements are sufficiently tailored to the regulatory objective.

24 F.3d at 710.

For these reasons, the Court rejects Plaintiffs' challenge to the notice provision contained in Ordinance 97-75. The Court finds no constitutional defect in this provision.

E. *Structural, Visibility, and Lighting Requirements*

1. Permissibility of Non-Locational Regulation of Sexually Oriented Businesses Under Texas State Law

Before moving on to consideration of the Ordinance's non-locational provisions, the Court will first address briefly the Dee & Dee Plaintiffs' argument that Texas law confines municipal regulation of sexually oriented businesses to issues of location and geographical density. *See* Dee & Dee's Response [Doc. # 178], at 52-54. According to these Plaintiffs, Tex.Loc. Gov't Code § 243 defines the outer boundaries of cities' permissible regulation of sexually oriented businesses, and because § 243.006 only provides for regulation of the businesses' location and density, all other types of regulation contained in Ordinance 97-75 are invalid.[139]

---

[139] The Dee & Dee Plaintiffs appear also to argue that this alleged state statutory limitation renders the Ordinance invalid under the federal constitution. Plaintiffs contend that since Houston has purported to go beyond protecting what the state has recognized as a substantial city interest, the Ordinance cannot have been designed to satisfy, and cannot be narrowly tailored to advance, a substantial government interest. *See* Dee & Dee's Response [Doc. # 178], at 33-36.

(Continued on following page)

Here, Plaintiffs are clearly mistaken. Section 243 does not place limits on Houston's regulatory power. In fact, § 243.001(b) expressly states that "[t]his chapter does not diminish the authority of a local government to regulate sexually oriented businesses with regard to *any matters*" (emphasis added). Furthermore, a Texas appellate court recently disposed of Plaintiffs' argument with the following historical explanation:

> Prior to August 28, 1989, Chapter 243 of the Texas Local Government Code authorized municipal and county authorities to regulate sexually oriented businesses only as to location .... However, the Seventy-first Legislature amended Chapter 243, effective August 29, 1989, which thereafter in section 243.003(a) provided: "A municipality by ordinance or a county by order of the commissioners court may adopt regulations regarding sexually oriented businesses as the municipality or county considers necessary to promote the public health, safety, or welfare." Tex.Loc. Gov't.Code § 243.003(a) (Vernon 1996). By deleting the word "location" in this section, the Legislature intended that regulations other than "location" could be adopted by municipalities governing sexually oriented businesses since a municipality was already authorized to regulate the location and density of these businesses.

Robinson v. City of Longview, 936 S.W.2d 413, 416-17 (Tex.App. – Tyler 1996, no writ). The Court therefore rejects Plaintiffs' argument that Texas law confines Houston's

---

The Court rejects Plaintiffs' attempt to bootstrap this state law issue into federal constitutional law. Plaintiffs have cited no authority for the proposition that, for federal constitutional purposes, a city's legitimate governmental interests are limited to those described by state statute.

regulation of sexually oriented businesses to issues of location and density.[140]

2. What These New Requirements Prohibit

As noted earlier, Ordinance 97-75 extends the application of Article II, which previously applied only to adult arcades, to cover adult mini-theatres as well. Thus, two provisions of Article II, §§ 28-101 and 28-103, which require businesses to maintain unobstructed views of their entire premises from one or two managers' stations and to maintain a specified minimum level of interior lighting, newly apply under the Ordinance to adult mini-theatres.

Ordinance 97-75 also creates an entirely new section, § 28-136, that establishes visibility, lighting, supervision, and police access requirements in Article III for all sexually oriented businesses. Of these requirements, Plaintiffs are most concerned by § 28-136(b), which prohibits adult entertainment from being provided in enclosed areas. This section states that:

> It shall be unlawful for any owner, operator or manager of any enterprise to permit any employee to provide any entertainment to any customer in any separate area within an enterprise to which entry or access is blocked or obscured by any door, curtain or other barrier, regardless of

---

[140] Plaintiffs also assert that, to the extent the City's regulation is beyond the scope of authority provided by Tex.Loc. Gov't Code § 243, the regulation is a violation of due process. *See* Dee & Dee's Response [Doc. # 178], at 56. Because the Court does not find the City exceeded its statutory authority here, Plaintiffs' due process argument must fail.

> whether entry to such separate area is by invitation, admission fee, club membership fee or any form of gratuity or consideration.

§ 28-136(b). Ordinance 97-75 also establishes a new provision, § 28-258(c), which specifically prohibits entertainers from violating this rule by providing entertainment in enclosed areas. Section 28-258(c) provides that:

> It shall be unlawful for any employee to engage in entertainment or to expose any specified anatomical areas or engage in any specified sexual activities in the presence of a customer in any separate area within an enterprise to which entry or access is blocked or obscured by any door, curtain or other barrier separating entry to such area from any other area of the enterprise.

It appears that § 28-136(b) will affect adult arcades and mini-theatres by forcing them to remodel their facilities to eliminate enclosed booths, which are small private areas in which patrons view adult entertainment provided by coin- or other mechanically-operated machines. It also appears that § 28-136(b), along with § 28-258(c), will affect other businesses, such as adult cabarets and lounges, by prohibiting small closed-off areas in which patrons may view live adult entertainment.

It is unclear, however, what effect these provisions would have on large open areas of adult cabarets and lounges that are separated from the main rooms of these businesses. One of the FTU Plaintiffs, Ice Embassy, has apparently unsuccessfully sought clarification from the City as to whether these restrictions prohibit the operation of large "VIP rooms" that are separate from the main areas of adult business but that themselves allow clear

visibility within them and thus conform to the Ordinance's other structural restrictions.

Although the FTU Plaintiffs originally stated that they were not challenging the Ordinance's prohibition against providing sexually oriented entertainment in enclosed, private areas, *see* FTU's Response [Doc. # 170], at 2, Ice Embassy later moved to amend its Complaint to include a challenge to this provision. *See* Motion for Leave to File Supplemental Complaint [Doc. # 255]. In its Supplemental Complaint, Ice Embassy requests an adjudication of whether § 28-136(b) would prohibit its construction of a large, separately enclosed "VIP room" on its business premises that would occupy more than 4,000 square feet and provide sufficient space to hold more than 200 patrons.

The City objects to Ice Embassy's Motion for Leave on the grounds that it is untimely [141] and unnecessary in light of the fact that several other groups of Plaintiffs have already challenged § 28-136(b).[142] With respect to the timeliness issue, Ice Embassy argues that the City will suffer no prejudice from the amendment and that, because

---

[141] Ice Embassy's Motion for Leave was filed on October 10, 1997. The deadline for amending complaints was June 17, 1997. *See* Order [Doc. # 121].

[142] In addition, the City has objected to several affidavits submitted by Ice Embassy, in which affiants attest to facts regarding Ice Embassy's attempt to obtain a determination from the City of whether its proposed VIP room would violate the Ordinance. *See* City's Response to Ice Embassy's Motion for Leave [Doc. # 278]. The City claims that these affidavits are irrelevant, constitute inadmissible expert conclusions, contain hearsay, and are not supported by adequate foundations. The City's objections [Doc. # 278] are **OVERRULED**. The Court has considered the evidence for the limited purposes of attempting to ascertain the current status of this issue.

it only recently commenced plans to construct a private VIP room, it only recently acquired standing to raise this challenge. Ice Embassy argues further that it would be a waste of judicial resources for this Court to disallow the amendment and require Ice Embassy to raise an as applied challenge to the provision in a separate lawsuit. With respect to the City's second argument, Ice Embassy strenuously argues that no other Plaintiff has standing to raise this precise challenge because no other Plaintiff has the type of VIP room which Ice Embassy plans to construct.

The Court will allow the amendment to Ice Embassy's Complaint. In light of the fact that other Plaintiffs have challenged the Ordinance's prohibition on entertainment in private rooms, the City will suffer little, if any, prejudice from the amendment. In addition, the Court agrees that judicial economy mitigates in favor of addressing all related issues in this lawsuit. *See* Fed.R.Civ.P. 15(a) ("leave [to amend] shall be freely given when justice so requires"); *Foman v. Davis,* 371 U.S. 178, 182, 83 S.Ct. 227, 9 L.Ed.2d 222 (1962); *Lowrey v. Texas A & M University System,* 117 F.3d 242, 245-46 (5th Cir.1997) ("Rule 15(a) expresses a strong presumption in favor of liberal pleading .... [T]he touchstone of the inquiry under rule 15(a) is whether the proposed amendment would unfairly prejudice the defense by denying the defendants notice of the nature of the complaint").[143]

[143] The City argues that Ice Embassy does not have standing to raise this challenge because it has not yet constructed the proposed VIP room. The Court rejects this argument. Ice Embassy has submitted evidence that it will cost approximately $400,000 to build the room. The

(Continued on following page)

3. Legislative Justification for These Requirements

Plaintiffs argue that the legislative record contains no evidence of any need for the Ordinance's new structural, visibility, and lighting requirements and therefore these requirements should be struck down as content-based burdens on speech. *See* Dee & Dee's Response [Doc. # 178], at 28. The Court disagrees. The Court has found ample evidence in the legislative record that the City enacted these requirements in order to combat documented secondary effects that occur inside sexually oriented businesses.

Most notably, the record is replete with testimony and discussion of criminal offenses, such as public lewdness, that occur most frequently when physical obstructions and low levels of lighting exist within these businesses. *See, e.g.,* Minutes for August 8, 1996, Committee Meeting, Exhibit 6D to City's Motion [Doc. # 120], at 10-11; Transcript of August 29, 1996, Committee Meeting, Exhibit 8E to City's Motion, at 85-86. The record also contains testimony regarding, and much discussion of the fact that, requiring minimal levels of lighting and clear lines of sight inside sexually oriented businesses would allow police officers to make arrests for such crimes as public lewdness without needing to participate in the criminal activities themselves. *See, e.g.,* Minutes for August 8, 1996, Committee Meeting, Exhibit 6D to City's Motion, at 10-11; Transcript of

---

Court agrees that Ice Embassy is entitled to a ruling on the constitutionality of the Ordinance provision before it makes this investment.

August 19, 1996, Committee Meeting, Exhibit 7G to City's Motion, at 142-43.[144]

In addition, the Court notes that the structural, visibility, and lighting requirements which now apply to all sexually oriented businesses and are contained in the new §§ 28-136(b) and (d) are very similar to the requirements that previously applied only to adult arcades and were upheld in *SDJ*. Likewise, the structural, visibility, and lighting requirements that now apply to adult mini-theatres in §§ 28-101 and 103 are *identical* to the requirements that previously applied to adult arcades. As the Fifth Circuit has noted, a city may take one step at a time in adopting new regulations for adult businesses. *See Hang On,* 65 F.3d at 1256. The Court finds that the City

---

[144] It is unclear whether any Plaintiffs are also challenging § 28-102, which requires adult arcades and mini-theatres to seal their interior walls in order to eliminate so-called "glory holes," on the ground that this provision is unsupported by a substantial governmental interest. This section provides that "no adult arcade or adult mini-theatre shall be configured in such a manner as to have any opening in any partition, screen, wall or other barrier that separates viewing areas for arcade devices or adult mini-theatre devices from other viewing for arcade devices or adult mini-theatre devices." As discussed *infra* in Section V.E.5, the Court rejects the N.W. Enterprises Plaintiffs' argument that this provision will impose economic harm on businesses that must undertake costly renovations to comply with the requirement. The Court also declines to strike it down as a content-based provision. The legislative record contains sufficient evidence to justify this requirement as a content-neutral, narrowly tailored means of achieving a substantial governmental interest. Specifically, the City Council's Sexually Oriented Business Committee heard testimony from Houston police officers that patrons use these holes to engage in anonymous sexual activity. *See, e.g.*, Transcript of August 29, 1996, Committee Meeting, Exhibit 8E to City's Motion [Doc. # 120], at 101-04. Thus, the City constitutionally enacted this provision in order to achieve substantial governmental interests, such as decreasing the spread of sexually transmitted diseases.

has adduced ample evidence supporting the extension of these requirements to businesses other than adult arcades.

Thus, the Court concludes that these requirements are content-neutral and should be evaluated under intermediate scrutiny. Applying this constitutional test, the Court finds that these restrictions are narrowly tailored to serve the City's substantial governmental interest in decreasing the commission of such crimes as public lewdness and prostitution inside sexually oriented businesses. The Court therefore finds that these requirements are facially valid under the First Amendment.

However, this ruling does not purport to address the "as applied" challenge Ice Embassy has raised to §§ 28-136(b) and 28-258(c) with respect to large VIP rooms. Ice Embassy has filed a Motion for Partial Summary Judgment [Doc. # 258] declaring that these provisions are unconstitutional as applied to its own proposed VIP room. It does not appear that the City has responded to this motion, most likely because the City was uncertain as to whether the Court would allow Ice Embassy to amend its Complaint.

The Court finds that the issue regarding large VIP rooms, on which the City's position remains somewhat unclear, is not ripe for disposition at this time. If the City intends to construe and enforce §§ 28-136(b) and 28-258(c) so as to prevent such a large room to exist within a sexually oriented business, the City must submit a response to Ice Embassy's Motion for Partial Summary Judgment

[Doc. # 258] within ten business days of entry of this Order.[145]

4. Patrons' Right to Privacy

The N.W. Enterprises Plaintiffs contend that § 28-101(a), which requires that the interior of adult arcades and mini-theatres be configured so as to allow an unobstructed view of each area to which patrons are permitted access,[146] violates patrons' right of privacy. *See* N.W. Enterprises' Response [Doc. # 151], at 15-16. Although these Plaintiffs acknowledge that federal courts have generally rejected this asserted privacy right, *see Matney v. County*

---

[145] The Court cannot conceive, based on the current legislative record, how §§ 28-136(b) and 28-258(c) could serve any substantial governmental interest as applied to large, well lit VIP rooms that hold 200 patrons and permit access for City police officers. The governmental interests justifying these provisions' prohibition of adult entertainment being provided in small enclosed rooms – including the prevention of such crimes as public lewdness and prostitution and the prevention of the spread of sexually transmitted diseases – do not appear to be at stake in the context of large rooms that just happen to be separated from the businesses' main areas. The VIP room which Ice Embassy has proposed is large enough in fact to be its own enterprise separate from Ice Embassy's main room. So long as businesses containing these large separate rooms comply with the other regulations in the Ordinance within these rooms, such as the visibility, lighting, and police access requirements, the Court fails to see what legitimate interest the City could have in prohibiting them.

[146] As noted above in Section V.E.2., § 28-101 previously applied only to adult arcades, but under Ordinance 97-75, now applies to adult mini-theatres as well. Section 28-101 provides, in relevant part, that "the interior of the adult arcade or adult mini-theatre shall be configured in such a manner that there is an unobstructed view of every area of the adult arcade or adult mini-theatre to which any patron is permitted access for any purpose from that manager's station." As applied to adult arcades, this regulation was upheld against constitutional attack in *Rahmani*, 748 S.W.2d 618.

of Kenosha, 86 F.3d 692, 698-99 (7th Cir.1996); *Ellwest Stereo Theatres, Inc. v. Wenner,* 681 F.2d 1243, 1247-48 (9th Cir.1982), they argue that Texas state courts have accepted it. In support of this argument, they cite *Wilkins v. State,* 829 S.W.2d 818, 821-22 (Tex.App. – Austin 1992, no writ), and *Liebman v. State,* 652 S.W.2d 942, 948-49 (Tex.Crim.App.1983, en banc).

The Court is not persuaded by Plaintiffs' argument. First, this Court is not obligated to defer to state court decisions on this issue in lieu of applicable federal case law. In the Texas cases cited by Plaintiffs, the courts' decisions were not based on a broader interpretation of state constitutional privacy law than is provided by federal law. Instead, these state courts purported to construe the Fourth Amendment to the United States Constitution. *See Wilkins,* 829 S.W.2d at 820; *Liebman,* 652 S.W.2d at 945 n. 6 ("our disposition of these appeals is predicated only upon the Fourth Amendment to the Federal Constitution since no independent State grounds have been advanced"). On matters of federal constitutional interpretation, opinions of federal appellate courts provide greater precedential value than those of state appellate courts. *See Grantham v. Avondale Industries, Inc.,* 964 F.2d 471, 473 (5th Cir.1992) ("'[t]he federal district court . . . takes as its authority on federal constitutional issues decisions of the United States courts of appeals and the United States Supreme Court, rather than those of the state supreme court'") (quoting *In re Asbestos Litigation,* 829 F.2d 1233, 1237 (3rd Cir.1987)).

Second, in any event, Plaintiffs' Texas cases do not hold, as Plaintiffs contend, that patrons have any generalized right to privacy in adult arcades or adult mini-theatres. Instead, the courts' decisions were fact-specific.

In *Liebman,* the court based its decision, that a patron had a right of privacy in an adult theatre booth that contained a "glory hole," on its specific determination that the configuration of the booth led the patron to have a reasonable expectation of privacy in that booth. The court concluded that a police officer who peered over a seven foot wall by standing on another officer's cupped hands, in order to see one patron masturbate another through a hole in the wall of an adjoining booth, engaged in an illegal warrantless search in violation of the Fourth Amendment. In reaching this decision, the court noted that the theatre management took affirmative steps to assure the privacy of its patrons. *See id.* at 947-48. Likewise, in *Wilkins,* the court concluded that a patron had a justifiable expectation of privacy because the booth he entered had "a curtain which excluded outside viewers and a light which reflected that the booth was 'in use.'" 829 S.W.2d at 821.

By requiring sexually oriented businesses to configure their premises so as to allow an unobstructed view to all areas, Ordinance 97-75 simply obviates the possibility that patrons of these businesses, unlike the patrons described in *Liebman* and *Wilkins,* will have any subjective, reasonable expectation of privacy while on the premises. If patrons have no *expectation* of privacy in this circumstance, then they have no *right* of privacy under the Fourth Amendment. *See Katz v. United States,* 389 U.S. 347, 351, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967); *United States v. Ishmael,* 48 F.3d 850, 854 (5th Cir.1995).

Plaintiffs have offered no legal authority for the proposition that the City is precluded from denying patrons of adult businesses any expectation of privacy while on the premises of those businesses. The Court therefore

rejects Plaintiffs' contention that § 28-101(a) violates patrons' right of privacy.[147]

5. Economic Harm to Plaintiffs

The N.W. Enterprises Plaintiffs have submitted evidence purporting to show that they will suffer a substantial economic burden in complying with the new structural and visibility requirements imposed by Ordinance 97-75.[148] They contend that this evidence is relevant

---

[147] The A.H.D. Plaintiffs have also briefly raised the argument that §§ 28-136(b) and 28-258(c), which prohibit adult entertainment in enclosed areas, violates patrons' right to privacy. *See* A.H.D.'s Response [Doc. # 173], at 43. In addition, the Dee & Dee Plaintiffs have briefly argued that the Ordinance is invalid in that it bans all private or semi-private participation in protected speech. *See* Dee & Dee's Response [Doc. # 178], at 58. The Court's analysis above with respect to the N.W. Plaintiffs' privacy argument applies with equal force to the A.H.D. and Dee & Dee Plaintiffs' privacy arguments. Plaintiffs have not cited any authority for the proposition that there is a constitutional right to participate in private speech in a non-private setting such as a commercial sexually oriented business.

[148] Specifically, the N.W. Enterprises Plaintiffs have submitted estimates, based on construction bids, of how much it would cost to remodel their mini-theatre devices in order to conform with the Ordinance's visibility requirement. *See* Affidavit of Cecil Eugene Ethridge (President of N.W. Enterprises) [Doc. # 202] ($197,698.70 to remodel 36 devices); Affidavit of Steve L. Collins (President of Campus Investments, Inc.) [Doc. # 241] ($348,890.00 to remodel 84 devices); Affidavit of Steve Sewell (Manager of Executive Adult Video Superstore), Attachment to N.W. Enterprises' Cross-Motion [Doc. # 268] ($120,000.00 to remodel 13 devices). In addition, Plaintiffs claim that if they do not remodel their devices, but instead simply remove these devices altogether, their businesses' revenues would be reduced by approximately two-thirds.

The City objects to these affidavits because "[n]one of the affiants claim to have applied for permits under Article II and been denied, so their legal conclusions as to whether or not they have to comply with the provisions of the Ordinance, and in what manner, are highly

(Continued on following page)

to the Court's consideration of the validity of these requirements, first, because it shows that the Ordinance constitutes a taking and, second, because financial harm is, under *Turner,* now a relevant factor under the First Amendment inquiry. However, the N.W. Enterprises Plaintiffs concede that if the Court finds the *Turner* standard inapplicable, these requirements are "probably constitutional" under the prior case law. *See* N.W. Enterprises' Response [Doc. # 151], at 9 (citing, *e.g., TK's Video,* 24 F.3d 705).

The N.W. Enterprises Plaintiffs' economic argument fails in light of this Court's holding in Section V.C.4. that the Ordinance does not constitute a taking for adult arcades and mini-theatres and in light of this Court's conclusions regarding *Turner,* discussed *supra* in Section III.A.4. *See also DLS,* 107 F.3d at 413 (holding that expensive renovations to adult cabarets to accommodate regulations are constitutional; "we consider the economic effects of the ordinance in the aggregate, not at the individual level; if the ordinance were intended to destroy the market for adult cabarets, it might run afoul of the First Amendment, but not

---

suspect." City's Response to N.W. Enterprises' Cross-Motion [Doc. # 302], at 4-5. This objection is **OVERRULED**. Plaintiffs, like all persons under the law, are charged with the responsibility of interpreting the law to assess its application to them. Plaintiffs are reasonable in their view that their devices, which they concede are currently contained in enclosed booths, violate the Ordinance.

The City has also filed a Motion to Strike the Collins Affidavit [Doc. # 246] because it was filed after the deadline for Plaintiffs' responses. Since the City has had the opportunity to review the affidavit for months before the Court's ruling on the pending motions, the City had ample time to respond to the matters in the affidavit. The City's Motion to Strike [Doc. # 246] is therefore **DENIED**.

if it merely has adverse effects on the individual [business]").

F. *Signage and Exterior Portions Restrictions*

The FTU Plaintiffs argue that the restrictions imposed on sexually oriented businesses' signage and exterior portions in §§ 28-129 and 28-130 violate their federal and state constitutional rights and state statutory rights. *See* FTU's Response [Doc. # 170], at 109-35. Although Plaintiffs attack these provisions in full, Ordinance 97-75 has only modified them in one narrow respect, namely in extending the signage restrictions contained in § 28-130 to sexually oriented businesses located in multi-unit commercial centers. Other than this one modification, Ordinance 97-75 leaves these provisions unchanged from the previous versions of the Ordinance. Because these provisions were specifically upheld in *SDJ,* the only issue actually presented to this Court with respect to signage and exterior decor is whether the City was justified in enacting the one modification in Ordinance 97-75 that extended the scope of the signage restrictions to businesses located in multi-unit centers.

1. The Restrictions

With respect to exteriors, § 28-129 requires that sexually oriented businesses maintain "achromatic" "exterior portions." This section allows the outer walls of sexually oriented businesses to be gray, tan, or light earth

tones, but not white, black, or any bold color.[149] Ordinance 97-75 does not modify this provision in any way. Therefore, the current restrictions on sexually oriented businesses' exterior portions is entirely unchanged from the previous version of the Ordinance and has already been upheld against attack in *SDJ*. *See* 636 F.Supp. at 1369.[150]

With respect to signage, § 28-130 limits sexually oriented businesses to the use of two simple on-site signs: one "primary sign" and one "secondary sign." A primary sign may be no larger than seventy-five square feet, and a secondary sign may be no larger than twenty square feet. A primary sign may contain words only, which are limited to the name and a description of the business, such as "adult cabaret" or "adult entertainment." All signs must have a "uniform and solid color" background, and their

---

[149] "Achromatic" is defined as:

> Colorless, lacking in saturation or hue. Without limitation, grays, tans and light earth tones shall be included, but white and black and any bold coloration that attracts attention shall be excluded from the definition of achromatic.

§ 28-121. "Exterior portion" is defined as:

> Any part of the physical structure of an enterprise, including a wall, veneer, door, fence, roof, roof covering, or window, which is visible from any public way or public property.

§ 28-121.

[150] In *SDJ*, the district court addressed the Ordinance's provisions regarding signage and exterior portions in the same discussion, holding that "[a] restriction on the signage and exterior portions which allows modest, subdued advertising is appropriate in order to prevent a decline in the values of surrounding properties, and thus prevent deterioration of neighborhoods." 636 F.Supp. at 1369. Although the Fifth Circuit affirmed the district court's decision with respect to signage, it did not specifically refer to the Ordinance's provision regarding exterior portions.

lettering must have a uniform print-type, size, and color.[151] Any violation of these restrictions can subject an operator

---

[151] In full, subsections (a)-(f) of § 28-130 provide as follows:

(a) Notwithstanding chapter 46 of the *City of Houston* Building Code – *General Provisions* or any other city ordinance, code, or regulation to the contrary, it shall be unlawful for the owner or operator of any enterprise or any other person to erect, construct, or maintain any sign for the enterprise other than one (1) primary sign and one (1) secondary sign, as provided herein.

(b) Primary signs shall have no more than two (2) display surfaces. Each such display surface shall:

(1) Not contain any flashing lights;

(2) Be a flat plane, rectangular in shape;

(3) Not exceed seventy-five (75) square feet in area; and

(4) Not exceed ten (10) feet in height or ten (10) feet in length.

(c) Primary signs shall contain no photographs, silhouettes, drawings or pictorial representations of any manner, and may contain only:

(1) The name of the enterprise; and/or

(2) One (1) or more of the following phrases:

(a) 'Adult bookstore.'

(b) 'Adult movie theatre.'

(c) 'Adult encounter parlor.'

(d) 'Adult cabaret.'

(e) 'Adult lounge.'

(f) 'Adult novelties.'

(g) 'Adult entertainment.'

(h) 'Adult modeling studio.'

(3) Primary signs for adult movie theatres may contain the additional phrase, 'Movie Titles Posted on Premises.'

(d) Each letter forming a word on a primary sign shall be of a solid color, and each such letter shall be the same print-type, size and color. The background behind such lettering

(Continued on following page)

of a sexually oriented business to a license revocation and misdemeanor punishment of a $4,000 fine and/or one year in jail, under Tex. Penal Code § 12.21. *See* §§ 28-127(a)(2) and 28-133(a).[152]

---

on the display surface of a primary sign shall be of a uniform and solid color.

(e) Secondary signs shall have only one (1) display surface. Such display surface shall:

(1) Be a flat plane, rectangular in shape;

(2) Not exceed twenty (20) square feet in area;

(3) Not exceed five (5) feet in height and four (4) feet in width; and

(4) Be affixed or attached to any wall or door of the enterprise.

(f) The provisions of item (1) of subsection (b) and subsections (c) and (d) shall also apply to secondary signs.

[152] The City has submitted information regarding its interpretation of the Ordinance's signage requirements in the form of an affidavit by an official in the Houston Sign Administration Division, the department that is responsible for the implementation and enforcement of the City's signage regulation. *See* Affidavit of Ollie Schiller, Exhibit C to City's Response to FTU's Cross-Motion [Doc. # 225]. The FTU Plaintiffs have moved to strike this affidavit [Doc. # 247] as a sanction against the City for not identifying this official earlier or making her available for a deposition and on the grounds that her testimony constitutes inadmissible legal conclusions by a lay witness, exceeds her stated expertise, fails to provide adequate factual foundation, and constitutes inadmissible hearsay. Because the Court has not relied on this affidavit, this motion [Doc. # 247] is **DENIED AS MOOT**. However, should the affidavit become necessary for any reason, the Court would find it admissible. The City has explained to the Court's satisfaction that it did not identify this affiant earlier because it did not know that the facts to which she has testified would be in issue until the FTU Plaintiffs filed their Cross-Motion for Summary Judgment. Her testimony does not include legal conclusions but instead assists the Court by providing an interpretation of the Ordinance by the City agency charged with implementing its provisions. The affiant's testimony does not constitute hearsay because she bases her opinions on her personal knowledge and

(Continued on following page)

The only substantive modification that Ordinance 97-75 makes to these signage provisions is the addition of one new subsection, § 28-130(g), which merely clarifies that, when a sexually oriented business is located in a commercial multi-unit center, any sign located in that center that identifies the sexually oriented business will count toward the business's two-sign limit. In other words, if a sign connected with a multi-unit center identifies, along with other businesses, a sexually oriented business located in that center, then that sexually oriented business cannot also have its own additional primary and secondary signs.[153]

The City claims that it added this new provision in order to close what was perceived as a loophole in the previous version of the Ordinance that allowed sexually oriented businesses in multi-unit centers to use signs connected with the centers in addition to their own primary and secondary signs. According to the Legislative Report for Ordinance 97-75, "[h]istorical evidence indicates that

---

experience. Plaintiffs other objections go to the weight of this evidence, not to its admissibility.

[153] Specifically, § 28-130(g) provides that:

> Any sign located on the premises of a commercial multi-unit center containing an enterprise that displays the name, or any portion of the name of the enterprise, any name under which any enterprise was formerly operated on the premises, or that contains any of the terms set forth in item (2) of subsection (c) or any other terminology that is commonly used to identify, or is associated with the presence of a sexually oriented business, shall comply with all restrictions of this section. The intent of this subsection is to prevent the use of signage identifying the commercial multi-tenant center itself from being used as a subterfuge to evade the restrictions on sexually oriented business signs set forth in this section.

enterprises have evaded the size limitation of the sign ordinance by renting out a portion of their building thus changing their status to a 'multi-unit center.' In turn, they directly advertise on the allowed over sized signs." Exhibit 36 to City's Motion for Summary Judgment [Doc. # 120], at 25-26.

Plaintiffs raise numerous arguments as to why the Ordinance's signage restrictions are too stringent and violate their constitutional rights. For instance, they contend that these restrictions discriminate against sexually oriented businesses by limiting their signage far more than the City regulates signage for other types of businesses.[154] They argue that the City has failed to present evidence in the legislative record of the need for these restrictions and that therefore the Court should strike them down as content-based restrictions on speech under a strict scrutiny standard of review. They also contend that the severe limitations on their secondary signs prevent them from posting political signage and therefore restrict their rights to engage in political speech.[155] They claim that ambiguities in the signage

---

[154] Plaintiffs have submitted evidence that other types of similar businesses, such as bars or restaurants that do not provide sexually oriented entertainment, do not have such stringent limitations on the content and design of their signs and are allowed to have five on-site signs that may each be up to 750 square feet in size. *See* Exhibit 3 to Furlow Affidavit, Appendix in Support of FTU's Response [Doc. # 171], at 29-34 (reproducing City Sign Code § 4609, which details the structural requirements for permissible signs in the City of Houston); Exhibit 4 to Furlow Affidavit, at 5 (identifying various types of signs, such as ground, roof, wall, and marquee signs, which are available to non-sexually oriented businesses).

[155] In support of this argument, Plaintiffs point out that the Ordinance fails to contain an exemption for on-premises political speech like the exemption that appears in the City's general Sign Code, *see*

(Continued on following page)

provisions and in the City's enforcement of those provisions render them void for vagueness.[156] They argue that, even if the restrictions could withstand federal constitutional

---

Exhibit 3 to Furlow Affidavit, Appendix in Support of FTU's Response [Doc. # 171], at 22 (citing City Sign Code § 4608(b)), and thus contend that the signage restrictions for sexually oriented businesses constitute a total ban on political speech. Plaintiffs also argue that, by requiring a business's primary sign to identify the business, the Ordinance mandates a preference for commercial speech over non-commercial messages. Plaintiffs argue that this preference constitutes viewpoint discrimination in violation of the First Amendment and, in support, cite *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 512-13, 101 S.Ct. 2882, 69 L.Ed.2d 800 (1981) (striking down city ordinance which permitted on-site commercial speech but not non-commercial messages).

The FTU Plaintiffs also briefly argue that the signage restrictions deprive them of their property interest in their corporate names and logos, as well as their right to advertise their names and other commercial information regarding such topics as prices and hours. The Court finds no merit in this undeveloped argument. The Ordinance does not deprive Plaintiffs of their property interest in their names and logos but instead merely regulates how they may display such information.

[156] The FTU Plaintiffs argue that § 28-130(g) is void for vagueness because it gives inadequate notice to those charged with obeying it. *See* FTU's Response [Doc. # 170], at 130-32. Specifically, they challenge the provision's language that indicates that the extension of the signage restrictions to businesses located in multi-tenant shopping centers is intended "to prevent the use of signage identifying the commercial multi-tenant center itself from being used as a subterfuge to evade the restrictions on sexually oriented business signs set forth in this section." § 28-130(g). Plaintiffs claim to be uncertain as to what this provision means and what exactly would constitute an impermissible "subterfuge." They argue that the vagueness of this provision makes it especially susceptible to selective enforcement, allows unbridled discretion by the decisionmaker, and therefore will chill protected speech. The Court is unpersuaded. This statement which Plaintiffs challenge was obviously included in the provision as a statement of intent by the drafters the language. The statement simply explains how the new provision alters the prior version of this section of the Ordinance. The language Plaintiffs attack does not itself directly limit Plaintiffs' conduct.

review, they cannot survive a challenge under the Texas Constitution, which provides broader protection for speech than does the federal constitution.[157] Finally, they claim that the modification to the City's prior signage requirements violates a state procedural statute and constitutes a federal constitutional taking by depriving them of their property interests in their now non-conforming signs without providing them with any compensation.

The Court finds that Plaintiffs' full-scale attack on these restrictions is misplaced. With the possible exception of Plaintiffs' state statutory argument, discussed *infra* in Section V.F.4., Plaintiffs' arguments must fail. As previously noted, these exact same signage provisions, as applied to all sexually oriented businesses except those located in commercial multi-unit centers, were upheld by the district court and the Fifth Circuit in *SDJ*. As described in the next section, Plaintiffs have failed to persuade this Court that the Fifth Circuit's holding in *SDJ* with regard to these signage provisions is no longer binding authority.

---

[157] Plaintiffs also contend that, insofar as the restrictions limit political signage, they violate Article I, Section 27 of the Texas Constitution, which provides for the rights of citizens to petition for redress of grievance. This argument is frivolous. The Ordinance's signage restrictions do not prevent any individual or business from petitioning for redress of their grievances. If anything, the restrictions only limit one form of petition. Plaintiffs also argue that the restrictions violate Article I, Section 29 of the Texas Constitution, which provides for the "reservation of rights to the people." The Court finds no merit in this undeveloped argument.

2. The Continued Applicability of *SDJ*

The FTU Plaintiffs contend that the Fifth Circuit's cursory affirmation in *SDJ* of the City's previous signage restrictions[158] has been superseded or repudiated by subsequent Supreme Court authority. Although the Court finds some merit in Plaintiffs' arguments and has serious concerns regarding the severity of the City's restrictions on sexually oriented businesses' signage and exterior portions, the Court will not reconsider these issues that have been previously adjudicated. Until and unless the Fifth Circuit reconsiders its conclusions on these restrictions, this Court is bound by *SDJ*. *See Agostini,* 521 U.S. at ___, 117 S.Ct. at 2017 (quoted *supra* at 29).[159]

In any event, the Court notes some prominent distinctions between this case and the cases that Plaintiffs cite in support of their argument that the legal standards relevant

---

[158] In *SDJ,* the district court found that the City had met its burden in justifying the restrictions on signage and exterior portions, reasoning that "[a] restriction on the signage and exterior portions which allows modest, subdued advertising is appropriate in order to prevent a decline in the values of surrounding properties, and thus prevent deterioration of neighborhoods." 636 F.Supp. at 1369. In affirming the district court's decision on this issue, the Fifth Circuit provided only the following brief explanation:

> The Houston Ordinance . . . does not ban advertising completely; it merely requires appellants to employ "simple signs." Governments have the right to regulate and limit the content of advertisements within reason, and we are not persuaded that the City here has overstepped its bounds.

SDJ, 837 F.2d at 1278 (footnote omitted).

[159] The Court also notes that, although *SDJ* was decided in 1986, one Fifth Circuit Judge as recently as 1994 expressly noted approval of the *SDJ* court's upholding of Houston's restrictions on sexually oriented business signage. *See MD II Entertainment,* 28 F.3d at 497 (Jones, J., concurring).

to the signage and exterior portions issues have changed since *SDJ* was decided.

First, Plaintiffs note that the City originally defended these restrictions in part by reference to its "interest in preventing detrimental effects on minors." *SDJ*, 837 F.2d at 1280.[160] They claim that this interest now requires a different balancing in light of *Reno v. American Civil Liberties Union*, 521 U.S. 844, 117 S.Ct. 2329, 138 L.Ed.2d 874 (1997), in which the Supreme Court struck down portions of the Communications Decency Act,[161] a law that criminalized the knowing transmission of obscene material to minors through the Internet. In *Reno*, the Court declared that:

> [T]he Government may not "reduce the adult population . . . to . . . only what is fit for children." . . . "Regardless of the strength of the government's interest [in protecting children], the level of discourse reaching a mailbox simply cannot be limited to that which would be suitable for a sandbox."

Id. at 2346 (quoting *Denver Area Educ. Telecomm. Consortium v. F.C.C.*, 518 U.S. 727, 116 S.Ct. 2374, 2393, 135 L.Ed.2d 888 (1996), and *Bolger v. Youngs Drug Prods. Co.*, 463 U.S. 60, 74-75, 103 S.Ct. 2875, 77 L.Ed.2d 469 (1983)). Despite this strong statement, *Reno* did not *alter* the constitutional test that would apply to *every* law that is justified in any part by reference to protecting minors. Instead, in *Reno*, the Supreme Court was faced with a new

---

[160] As previously noted, the City also justified its signage and exterior portions restrictions with reference to protecting property values. *See SDJ*, 636 F.Supp. at 1369.

[161] 47 U.S.C. §§ 223(a)(1) and 223(d).

technological medium and simply sought to apply existing doctrine to a novel context.[162] Moreover, *Reno* concerned an issue of access to constitutionally protected speech and not merely the advertising of such speech. Thus, the Court is not persuaded that *Reno* requires it to reevaluate the Fifth Circuit's condonation in *SDJ* of the City's partial justification of protecting minors in support of its restrictions on sexually oriented businesses' signage and exterior portions.

Second, Plaintiffs cite *44 Liquormart,* 517 U.S. 484, 116 S.Ct. 1495, 134 L.Ed.2d 711, in which the Court struck down a state's statutory ban on price advertising for alcoholic beverages, and *City of Ladue v. Gilleo,* 512 U.S. 43, 114 S.Ct. 2038, 129 L.Ed.2d 36 (1994), in which the Court struck down a city ordinance banning most signs erected on residential property. These cases involved *total* bans on certain types of signs, not merely restrictions on those signs. Ordinance 97-75, in contrast, does not *ban* advertising by sexually oriented businesses altogether and is therefore not implicated by the Supreme Court's holdings in these cases.

Finally, Plaintiffs cite *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah,* 508 U.S. 520, 113 S.Ct. 2217, 124 L.Ed.2d 472 (1993), a First Amendment religious freedom case. Plaintiffs have failed to persuade the Court that this case is applicable to the issues presented here.

---

[162] In particular, the Court concluded that the Internet is more similar to traditional, protected speech than it is to "invasive" broadcast media such as radio and television; the Court therefore chose to apply the First Amendment test that had previously been established for non-broadcast media. *See Reno,* 521 U.S. 844, 117 S.Ct. at 2343.

Plaintiffs also argue that the free speech provision of the Texas Constitution has developed since *SDJ*. *See* FTU's Supplemental Letter Brief [Doc. # 172]. However, in support of this argument, Plaintiffs are unable to cite any cases specifically applicable to the context presented in the case at bar. They instead note that the Texas Supreme Court has held *generally* that the Texas Constitution affords more protection for speech than the United States Constitution. The cases that have recognized greater speech protections under the Texas Constitution have been in such contexts as abortion clinic protests, *see Ex parte Tucci,* 859 S.W.2d 1, 7 (Tex.1993), and judicial gag orders, see *Davenport v. Garcia,* 834 S.W.2d 4, 8-9 (Tex.1992). In light of other Texas courts' holdings that this enhanced protection does not apply to adult entertainment, *see Schleuter v. City of Fort Worth,* 947 S.W.2d 920, 926 (Tex.App. – Ft. Worth 1997, writ denied), this Court declines to apply a separate Texas constitutional analysis to the Ordinance's signage and exterior portions provisions.

3. Extension of Signage Restrictions to Enterprises in Multi-Unit Centers

Because the Court concludes that it may not reexamine the constitutionality of the Ordinance's signage and exterior portions provisions that have already been upheld, the constitutional analysis here must focus solely on whether the City has satisfied the appropriate First Amendment test in enacting § 28-130(g), the modification that clarifies the signage provision's applicability to sexually oriented businesses located in multi-unit centers. The Court concludes that the City has met its burden on this issue.

First, the Court is persuaded that this modification is content-neutral. The legislative record for Ordinance 97-75 indicates that the City Council's Sexually Oriented Business Committee heard specific testimony relevant to negative secondary effects believed to be created by excessive signage of sexually oriented businesses located in multi-unit centers. According to this testimony, the previous version of the Ordinance did not effectively limit these businesses to two simple signs, as other sexually oriented businesses were limited. *See, e.g,* Minutes for June 17, 1996, Committee Meeting, Exhibit 2C to City's Motion [Doc. # 120], at 16; Minutes for October 3, 1996, Committee Meeting, Exhibit 10B to City's Motion, at 8;[163] Memorandum from Sam Nuchia, Chief of Police, to Helen Huey, Exhibit 9C to City's Motion, at 4; Minutes for

---

[163] The minutes to the October 3 meeting explain the Committee's discussion of the rationale for this new provision as follows:

> [This issue is] of concern to Legal and HPD and has been for a number of years. When the signage provision was originally enacted it was thought that tenants in centers should be treated differently than those in stand alone structures. The reason is that the signage and exterior provisions are to minimize as much as possible the secondary impact of the SOB on surrounding property values. . . . [S]ign control was designed to be a protection against garish advertising. Free-standing buildings are permitted two small signs . . . achromatic in color. . . . Someone asked at the time of the development of the ordinance: what if the business is in a strip center which is uniform architecturally and has one pole sign for all its tenants. It would make SOBs stand out to paint them a different color or have different signs. But what has happened as a result is that some of the businesses with enough space have added a barber shop or other businesses within their building and then call themselves a center. So they avoid the effect of the sign/color restrictions.

Minutes for October 3, 1996, Committee Meeting, Exhibit 10B to City's Motion [Doc. # 120], at 8.

October 11, 1996, Committee Meeting, Exhibit 11A to City's Motion, at 9-10;[164] Minutes for October 30, 1996, Committee Meeting, Exhibit 13B to City's Motion, at 9-10 (Committee discussed that original purpose of signage restrictions was to alleviate undesirable effects on property values of huge spectacular signs and that the exception for multi-unit centers has allowed this problem to persist).[165]

Because the modification is content-neutral, the Court must evaluate it under intermediate scrutiny. Based on the testimony cited and quoted above, the Court concludes that the extension in the coverage of the Ordinance's restrictions is narrowly tailored to serve a substantial government interest and allows sufficient alternative avenues of communication. The provisions which allow the

---

[164] One Council member provided the following firsthand testimony: "If you drive along the Southwest Freeway south of Hillcroft on the right hand side . . . you will see the sign which is right out of Las Vegas. The reason the building can have such a sign is because it simply punched another door in the building." Minutes for October 11, 1996, Committee Meeting, Exhibit 11A to City's Motion, at 10 (statement by Council member Ray Driscoll).

[165] An attorney from the City's Legal Department explained that:

> [T]he present ordinance allows multi unit centers to get out from under the more restrictive signage and exterior appearance requirements that apply to free standing SOBs. In practice this has led to some very large and spectacular signage and decor by the simple expediency of some of the SOBs adding another small business or two to their premises and calling it a multi unit center. This was a Legal Department recommendation initially based on some years of frustration in trying to enforce the original intention of the ordinance to keep the signage simple.

Minutes for October 30, 1996, Committee Meeting, Exhibit 13B to City's Motion, at 9.

businesses to use two simple signs provide them with sufficient opportunity to convey their exterior messages. The Court therefore concludes that the Ordinance's amendment to the previous signage restrictions, § 28-130(g), is valid under the First Amendment.[166]

4. State Law Requirements for Revising Signage Restrictions

As mentioned earlier, the FTU Plaintiffs have briefly raised the constitutional argument that the Ordinance's new signage provision constitutes an unlawful taking of the affected businesses' signs without any compensation. *See* FTU's Response [Doc. # 170], at 132. However, the Court does not yet need to address this constitutional claim because it must first consider Plaintiffs' related statutory arguments that the new signage provision fails to provide procedural and compensatory protection required under state law. *See Wells Fargo Bank,* 485 U.S. at

---

[166] Plaintiffs contend that the Ordinance's signage provisions should be evaluated, not under the First Amendment standard that applies to adult entertainment, but instead under the constitutional test for commercial speech regulation. *See* FTU's Response [Doc. # 170], at 125-27, (citing *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n.,* 447 U.S. 557, 100 S.Ct. 2343, 65 L.Ed.2d 341 (1980)). In *Central Hudson Gas,* the Supreme Court held that, when evaluating the validity of a restriction on commercial speech, a court must consider: (1) whether the speech is protected by the First Amendment; (2) whether the asserted governmental interest is substantial; (3) whether the regulation directly advances the governmental interest; and (4) whether the restriction is more extensive than necessary to satisfy the governmental interest. These factors appear substantially similar to the factors applicable to adult entertainment. Plaintiffs have not persuaded the Court that application of this set of factors would produce a different result here. Thus, the Court concludes that, under either set of factors, the City has justified its enactment of § 28-130(g).

354, 108 S.Ct. 1179 (court should "resolve statutory questions at the outset where to do so might obviate the need to consider a constitutional issue").

The FTU Plaintiffs' statutory argument against the new signage provision is that enforcement of this expansion of the Ordinance's previous signage restrictions would violate § 216.001 *et seq.* of the Texas Local Government Code. This statute establishes procedural requirements for a municipality's removal and alteration of signs. *See* FTU's Response [Doc. # 170], at 132. Specifically, § 216.004(a) provides that:

> If a municipality requires the relocation, reconstruction, or removal of a sign within its corporate limits or extraterritorial jurisdiction, the presiding officer of the governing body of the municipality shall appoint a municipal board on sign control.

The FTU Plaintiffs contend that the Ordinance requires them to alter or remove a number of their expensive signs but that the City has not appointed any compensation board as required by this state statutory provision. Plaintiffs also claim that the City has failed to comply with §§ 216.005 and 216.010, which require the newly created board to compile a list of non-conforming signs. Finally, Plaintiffs argue the City has failed to comply with §§ 216.009 and 216.012, which provide for compensation for owners of non-conforming signs when a municipality extends or strengthens its signage regulations.

In response to these arguments, the City merely contends that the FTU Plaintiffs did not include this state statutory claim in their original Complaint and thus moves to strike these arguments. *See* City's Reply to FTU's

Response [Doc. # 225], at 32-33. Because Plaintiffs' arguments appear on the surface to have merit, the Court will allow the FTU Plaintiffs an opportunity to amend their Complaint. These Plaintiffs and the City then may develop their arguments more fully. The City's Motion to Strike [Doc. # 225] is therefore **DENIED.**[167]

Thus, although the Court upholds the Ordinance's signage restrictions under the First Amendment, further factual development, through affidavits and some briefing of applicable law in light of the parties' positions on this state statutory issue, is necessary before the City may enforce the new amendment to the Ordinance's signage restrictions. Therefore, if the City will not continue to voluntarily forebear from enforcement of § 28-130(g), the Court will entertain a request for a preliminary injunction preventing the City from enforcing this provision until this issue is resolved. The Court will establish a briefing schedule on this issue by a separate Order, if necessary.

G. *Entertainer and Manager Permit Requirement*

In Ordinance 97-75, the City has established, for the first time, a requirement that all entertainers and managers must hold individual permits in order to work in

---

[167] In the alternative to its Motion to Strike, the City argues that the statutory provisions contained in Tex. Loc. Gov't Code § 216.001 *et seq.* do not preclude enforcement of the Ordinance's signage provisions because the Ordinance "does not address the kinds of regulatory action contemplated by Chapter 216." City's Reply to FTU's Response [Doc. # 225], at 33. The City has not developed this argument nor explained adequately to the Court why the Ordinance's signage provisions are not subject to the dictates of § 216.001 *et seq.*

sexually oriented businesses. *See* § 28-253.[168] Under the Ordinance, in order to obtain a permit, entertainers and managers must provide the following information: name; home street address; mailing address; proof of birth date; one photographic identity card issued by a governmental agency; a list of any criminal charges pending, convictions, and time of service in jail or prison related to certain offenses; two passport-type photographs; a $29.00 processing fee; fingerprints to be used for identity and criminal history information verification; and a waiver authorizing the City to obtain the individual's criminal history reports from the Texas Department of Public Safety and appropriate federal agencies. *See* § 28-254. In addition, the City's application form also requires each individual applying for a permit to provide the individual's stage name, if any; home, work, and emergency telephone numbers; place of birth; social security number; driver's license number; and descriptors, including hair and eye color, height, weight, and the description and location of any tattoos. *See* City of Houston Sexually Oriented Business Manager and Entertainer License Application, Exhibit C to City's Legal Brief on Plaintiffs' Applications for Temporary Restraining Order [Doc. # 57].

Section 28-254(c) requires that the City issue a permit for an applicant unless the applicant has been found to

---

[168] The Dee & Dee Plaintiffs argue that the Ordinance's permit requirement for individuals is too broad in that it covers too many categories of employees, including "almost any person who comes onto the premises for a commercial purpose, whether or not they have direct contact with the clientele of the business." *See* Dee & Dee's Response [Doc. # 178], at 57-58. However, these Plaintiffs are mistaken. Section 28-253(a) on its face only requires entertainers and managers to obtain permits, not other employees.

have "been convicted of or spent time in jail or prison for" certain enumerated offenses.[169] The City must issue a response to every applicant within ten days from the date an application is filed. *See* § 28-254(c). An unsuccessful applicant may appeal the denial of a permit, first to a hearing officer and then to state court. *See* §§ 28-254(c) and (e).[170] If the City fails to meet these deadlines, the applicant, upon written request, shall immediately be

---

[169] These offenses appear to include prostitution; promotion of prostitution; aggravated promotion of prostitution; compelling prostitution; obscenity; sale, distribution or display of harmful material to a minor; sexual performance by a child; employment harmful to children; possession or promotion of child pornography; public lewdness; indecent exposure; indecency with a child; sexual assault; aggravated sexual assault; harboring a runaway child; criminal attempt, conspiracy or solicitation to commit any of these offenses; and any violation of Article VIII of the Ordinance (the article related to individual employee conduct). *See* § 5, Ordinance 97-75 (amending § 1-10 of the HOUSTON, TEX., CODE OF ORDINANCES).

[170] Section 28-254(c) provides in pertinent part that:

> If the application is not granted, then the applicant shall be mailed notice of the grounds and of their right to provide evidence and request a hearing as provided by section 1-9(a) of this Code [of Ordinances], within ten days from the date of filing of the application.

Section 28-254(e) provides that:

> Any applicant whose application is denied and who requests a hearing on the denial shall be granted a hearing within ten days following the receipt of the request by the vice division of the police department. The hearing shall be conducted as provided in section 1-9(c) of the Code [of Ordinances]. If the hearing officer rules against the applicant, then the applicant shall be given notice of the right to seek an injunction or judicial review of the decision as provided in section 1-9 of the Code and applicable laws, including article 6252-13d of the Texas Revised Civil Statutes.

issued a temporary permit pending the application processing. *See* § 28-254(f).[171]

When an individual obtains a permit to work in a sexually oriented business, she or he is given two identification cards. The individual must conspicuously wear one of these cards (the "personal card") at all times while working. *See* § 28-256(a).[172] The other card (the "on-site card") must remain in the possession of the enterprise's "on-site manager" at all times while the individual is on the premises of the sexually oriented business. *See* § 28-256(b).[173]

Plaintiffs challenge these provisions on several constitutional grounds.[174] First, they contend that the individual

---

[171] Section 28-254(f) provides that:

> In the event that the director fails to issue or deny a permit application within the time specified in subsection (c) or to provide a hearing within the time specified in subsection (e), then the applicant shall, upon written request, be immediately issued a temporary permit which shall be valid until the third day after the applicant is given notice of the decision of the director or the hearing officer.

[172] Section 28-256(a) provides that "[e]ach manager or entertainer shall conspicuously display his [sic] personal card upon his [sic] person at all times while acting as an entertainer or manager of or in an enterprise."

[173] Section 28-256(b) provides that "[e]ach manager or entertainer shall provide his [sic] on-site card to the manager or on-site manager in charge of the enterprise to hold while the manager or entertainer is on the premises."

[174] The Dee & Dee Plaintiffs also raise a cursory statutory argument that the individual permit requirement is invalid because Texas Loc. Gov't Code § 243.007 allows cities to require licenses for owners and operators of sexually oriented businesses but does not provide for licensing of other employees. *See* Dee & Dee's Response [Doc. # 178], at 53-54. The Court rejects this argument for the same reasons described *supra* in Section V.E.1. In particular, § 243.001(b) specifically authorizes local

(Continued on following page)

permit requirement is *per se* invalid because of the severe chilling effect it will have on speech. Second, they argue that the legislative record does not contain sufficient evidence to justify the requirement and that therefore the Court should strike it down under strict scrutiny as a content-based restriction on speech. Third, they argue that, even if the requirement is content-neutral, it is not narrowly tailored to serve a substantial governmental interest. Fourth, they contend that the requirement is not narrowly tailored because the City failed to exempt information supplied in the individual permit applications from public disclosure under the Texas Public Information Act (known prior to 1995 as the Texas Open Records Act, *see* 1995 Tex.Gen. Laws 5127); they argue that such disclosure would be a dangerous invasion of privacy for entertainers and managers working in sexually oriented businesses. Fifth, they argue that the requirement is invalid because it is an unconstitutional prior restraint. Sixth, they raise several "as applied" challenges to the manner in which the Houston Police Department has conducted the initial permit application process. Finally, they argue that, even if the permit requirement is valid, the requirement that adult entertainers must conspicuously wear their personal identification cards while working is unjustified and therefore invalid.

For the reasons discussed below, the Court concludes that the permit requirement is, in most respects, constitutionally valid. However, because the Ordinance and the permit application form request more personal information than is justified to fulfill the City's stated purpose and

---

governments to regulate sexually oriented businesses "with regard to any matters."

more than has been condoned by relevant legal authority, the City must reduce the types of information it requires permit applicants to disclose. In addition, the Court finds that the release of permit application information to the public through the Texas Public Information Act would create a substantial danger to entertainers and managers that is unjustified by any conceivable municipal purpose; the Court therefore declares that this information is to remain confidential and is not subject to disclosure under the Act. Finally, because the City has not provided any logical justification for its requirement that entertainers wear their personal identification cards while working, the Court strikes down the conspicuous display requirement as an impermissible content-based intrusion on speech.

1. Permissibility of Individual Permit Requirement

Plaintiffs first argue that the individual permit requirement constitutes too great an intrusion on the privacy of managers and entertainers who work in sexually oriented businesses and thus will create an impermissibly severe chilling effect on constitutionally protected activities. *See* A.H.D.'s Response [Doc. # 173], at 46-47; FTU's Response [Doc. # 170], at 23-30. In support of these arguments, Plaintiffs cite several cases from other constitutional contexts that have stressed the right of individuals to engage in protected activities without being chilled by intrusive disclosure requirements. *See, e.g., McIntyre v. Ohio Elections Comm'n,* 514 U.S. 334, 342, 115 S.Ct. 1511, 131 L.Ed.2d 426 (1995) (distributing campaign literature); *Hynes v. Mayor and Council of Borough of Oradell,* 425 U.S. 610, 621, 96 S.Ct. 1755, 48 L.Ed.2d 243 (1976) (conducting door-to-door solicitations); *Talley v. California,* 362

U.S. 60, 64, 80 S.Ct. 536, 4 L.Ed.2d 559 (1960) (distributing handbills). However, as noted earlier, the Constitution provides less protection for adult entertainment than for other types of protected First Amendment activities. *See City of Renton,* 475 U.S. at 49 n. 2, 106 S.Ct. 925; *Woodall,* 49 F.3d at 1122. Therefore, in considering this issue, the Court must look to controlling authority specifically from the context of adult entertainment.

In *SDJ,* the district court struck down a provision that required operators of sexually oriented businesses to furnish lists of all their employees in order to obtain enterprise permits. The court held that

> [w]hile City government officials may have some legitimate interest in assuring that persons of proper age are employed within these enterprises, that interest is outweighed by the chilling or suppressive effect that Section 28-123(a)(6) would have on potential employees and contractors of topless dancing bars.

SDJ, 636 F.Supp. at 1371.[175] Although the *SDJ* district court's ruling in 1986 would appear to preclude the City's newly enacted permitting scheme for individuals, the Fifth Circuit in 1994 ruled otherwise and upheld licensing requirements for employees of sexually oriented businesses. In *TK's Video,* 24 F.3d at 710, the Fifth Circuit, rejecting contrary conclusions reached by other jurisdictions,[176] held that "requiring owners and employees to

[175] In *SDJ,* the Fifth Circuit did not address the district court's decision to strike down this disclosure requirement.

[176] The court noted that the Seventh and Ninth Circuits have invalidated similar disclosure requirements. *See Acorn Investments,*

(Continued on following page)

supply information about their age and certain prior regulatory infraction and sexual offenses substantially relates to the substantial government interest of curtailing pernicious side effects of adult businesses." Specifically, the Fifth Circuit found that "[l]icensing clerks and employees ensures that only persons who satisfy basic legal and hygienic standards work in adult businesses." *Id.* at 709.

Thus, controlling legal authority in this Circuit now generally allows cities to require that individuals working in sexually oriented businesses obtain licenses.[177] The

---

Inc. v. City of Seattle, 887 F.2d 219, 224-26 (9th Cir.1989); *Genusa v. City of Peoria*, 619 F.2d 1203 (7th Cir.1980).

[177] The A.H.D. Plaintiffs argue that *TK's Video* does not authorize licensing of entertainers who work for sexually oriented businesses as *independent contractors*, as many entertainers in Houston apparently do, because the Denton licensing requirement upheld in that case applied only to *employees*. *See* A.H.D.'s Reply [Doc. # 287], at 8 (citing *TK's Video*, 24 F.3d at 716). The Court rejects this argument. Plaintiffs have suggested no reason why the Fifth Circuit's rationale in upholding the licensing provision covering employees in *TK's Video* would not apply with equal force to entertainers working as independent contractors.

The A.H.D. and FTU Plaintiffs raise other general arguments against the individual permit requirement which are also preempted by *TK's Video*. *See* A.H.D.'s Response [Doc. # 173], at 48; FTU's Response [Doc. # 170], at 63. For instance, these Plaintiffs argue that the requirement is discriminatory, and thus violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution in addition to the First Amendment, because entertainers in sexually oriented businesses are the only entertainers in Houston who have to obtain permits as a condition of performing. In support of this argument, Plaintiffs cite *Arkansas Writer's Project, Inc.*, 481 U.S. 221, 107 S.Ct. 1722 (striking down, under strict scrutiny, sales tax scheme that taxed general interest magazines but exempted newspapers and religious, professional, trade, and sports journals); *Minneapolis Star and Tribune Co. v. Minnesota Com'r of Revenue*, 460 U.S. 575, 103 S.Ct. 1365, 75 L.Ed.2d 295 (1983) (striking down a use tax on the cost of

(Continued on following page)

Court's next task therefore is to consider whether the particular provisions enacted in Ordinance 97-75 regarding individual permits are constitutionally valid.[178]

2. Content-Based or Content-Neutral?

Although a licensing requirement for individuals working in sexually oriented businesses has been upheld in general in *TK's Video,* Plaintiffs argue that the Court should nevertheless strike down Houston's individual permit requirement under strict scrutiny as a content-based restriction on speech because the legislative record for Ordinance 97-75 contains no evidence of a need for this

---

paper and ink which applied to only a small group of newspapers). The A.H.D. Plaintiffs also argue that the criminal record check constitutes a bill of attainder because it punishes on the basis of prior acts, *see United States v. Brown,* 381 U.S. 437, 85 S.Ct. 1707, 14 L.Ed.2d 484 (1965); *SBC Communications, Inc. v. Federal Communications Commission,* 981 F.Supp. 996 (N.D.Tex.1997), and constitutes an ex post facto law because it imposes additional punishment to what was prescribed at the time of commission of an earlier criminal act, *see Selective Service System v. Minnesota Public Interest Research Group,* 468 U.S. 841, 104 S.Ct. 3348, 82 L.Ed.2d 632 (1984). The Court need not dwell on these arguments, since Fifth Circuit authority clearly permits licensing of adult entertainers, including criminal background checks, even when other types of entertainers are not subject to this requirement. Furthermore, Plaintiffs do not cite any cases in which a court has applied heightened *equal protection* scrutiny to sexually oriented business regulation. This Court will not do so here.

[178] The City points out in several of its briefs that some representatives of the Houston sexually oriented business industry endorsed the concept of employee licensing at the time the City Council was considering amendments to the Ordinance. *See, e.g.,* City's Motion for Summary Judgment [Doc. # 120], at 14-15. This evidence, however, is not relevant to the Court's analysis of whether the licensing provisions meet the requisite tests for constitutionality.

requirement. *See* Dee & Dee's Response [Doc. # 178], at 30-32; FTU's Response [Doc. # 170], at 22-23, 33.[179]

The Court disagrees. The legislative record for Ordinance 97-75 contains a great deal of evidence regarding negative secondary effects addressed by the permitting requirement for individuals. Specifically, the City Council's Sexually Oriented Business Committee was presented with statistical evidence from the Houston Police Department Vice Squad, as well as with numerous anecdotal descriptions by testifying police officers, indicating the extent of criminal activity by entertainers and managers within sexually oriented businesses. *See* Sexually Oriented Business Statistics Amended, Exhibit 21 to City's Motion [Doc. # 120].[180] *See also* Transcript of September 16, 1996, Committee Meeting, Exhibit 9D to City's Motion [Doc. # 120], at 7 (discussion of fact that managers have responsibility for behavior by entertainers and patrons). The

---

[179] In addition, the FTU Plaintiffs argue that the requirement is content-based because a significant amount of evidence exists in the record which demonstrates that the Houston City Council adopted the requirement with a predominate censorial purpose. *See* FTU's Response [Doc. # 170], at 50-53. As discussed *supra* at Section III.A.3., in determining whether to evaluate a provision as content-based or content-neutral, the Court will look primarily at whether the legislative record contains sufficient evidence justifying the requirement on the basis of reducing negative secondary effects associated with adult businesses.

[180] As discussed *supra* in Section V.B.3.a., Lieutenant Smith informed the Committee that the crimes depicted in this document consist entirely of crimes committed inside sexually oriented businesses, mostly public lewdness. *See* Minutes for July 15, 1996, Committee Meeting, Exhibit 3D to City's Motion [Doc. # 120], at 6. The other police testimony presented to the Committee implicated crimes such as public lewdness, prostitution, promotion of prostitution, obscenity, and indecent exposure.

Court concludes that a City Council member could have reasonably relied on this evidence to determine that a permit requirement for individuals would assist the City's criminal law enforcement by allowing only individuals to work in sexually oriented businesses who have not shown, by their previous criminal records, a propensity to engage in unlawful acts commonly associated with such businesses.

In addition, the Committee heard evidence that police have discovered underage entertainers working in sexually oriented businesses and testimony that a permit requirement would assist the City's law enforcement officials to prevent underage entertainers from obtaining such employment. *See* Minutes for August 8, 1996, Committee Meeting, Exhibit 6D to City's Motion, at 10; Transcript of August 29, 1996, Committee Meeting, Exhibit 8E to City's Motion, at 107.

Because the City has justified the Ordinance's new permit requirement for individuals by reference to specific evidence in the legislative record that the requirement would help alleviate negative secondary effects associated with adult businesses, the Court will evaluate the requirement as a content-neutral provision under intermediate First Amendment scrutiny.

3. Narrowly Tailored to Serve Substantial Governmental Interests?

To determine whether the Ordinance's new individual permit requirement survives intermediate scrutiny, the Court must next decide whether the requirement serves a

substantial governmental interest and is sufficiently narrowly tailored.[181]

As discussed in the previous section, the City has shown sufficient evidence that it enacted this permit requirement with the purpose of decreasing criminal activity within sexually oriented businesses. The Fifth Circuit has recognized that cities have a substantial governmental interest in "monitor [ing] persons with a history of regulatory violations or sexual misconduct who would manage or work in" sexually oriented businesses and has approved the use of licensing of individuals to achieve this goal. *TK's Video,* 24 F.3d at 710. Thus, this Court likewise concludes that the individual permit requirement for managers and entertainers contained in Ordinance 97-75 generally serves a substantial governmental interest.

The Court also concludes, however, that certain of the specific information requirements for individual permit applicants are not narrowly tailored to achieve that substantial governmental interest.

Plaintiffs contend that managers and entertainers who work in sexually oriented businesses must divulge more personal information than is necessary for the City to conduct criminal background checks on them. Plaintiffs fear that the breadth of information requested on a permit application will chill a substantial amount of speech because some managers and even more entertainers will forgo employment at Houston-area sexually oriented

---

[181] It does not appear that the alternative avenues of communication test should apply here. In *TK's Video,* the Fifth Circuit did not consider this issue in connection with licensing of individuals.

businesses rather than comply with the permit requirement. *See* FTU Plaintiffs' Response [Doc. # 170], at 26 (citing declarations by individuals affected by the permitting requirement). For instance, Plaintiffs argue that entertainers and managers may be stalked and harassed at home if the requested personal information is disclosed to the City.

The Court agrees that the information the City has requested from permit applicants is overbroad. This information is more than is even authorized by the Ordinance and is more than the City needs to conduct the criminal background checks, to verify that underage entertainers do not work in sexually oriented businesses, and to facilitate identification of individuals who commit crimes at sexually oriented businesses. The information the City has requested also goes beyond that which the Fifth Circuit has previously approved. In *TK's Video,* the Fifth Circuit specifically upheld only the required disclosure of an applicant's "age and certain prior regulatory infractions [related to sexually oriented businesses] and sexual offenses." *TK's Video,* 24 F.3d at 710. The Court of Appeals took special note that "[t]he Denton County order does not demand comprehensive disclosure of personal information, but only information reflecting ability to function responsibly in the adult business setting." *Id.* In addition, the court cautioned that because

> [c]ompelled content-neutral disclosure of owner and employee information can chill protected expression ... [w]e insist that countervailing state interests must further a substantial government interest. This protective skirt requires a "relevant correlation" or "substantial relation"

> between the information required and the government interest.

Id. at 709-10 (citations omitted).

Certain information required by the City, such as fingerprints and social security numbers, are obviously necessary for the criminal background checks. The Court can also conceive that an individual's name, stage name, social security number, height, weight, eye and hair color, tattoo descriptions, and driver's license numbers would be helpful in identifying individuals in the case of an arrest. However, the City has indicated no reason why it needs managers' and entertainers' phone numbers and home addresses, which may be often and easily changed.[182] The Court therefore enjoins the City from requiring managers and entertainers to disclose their phone numbers and home addresses on their permit applications.

Plaintiffs also object to the criminal history information required by the City's permit applications. Specifically, pursuant to § 28-254(a)(3), the form requires applicants to indicate a "list of any criminal charges pending, convictions, and time of service in jail or prison as related to any applicable offense." Plaintiffs argue that this information goes beyond that which the Ordinance allows to be considered in the decision to issue or deny an individual a permit. Section 28-254(c), which incorporates by reference § 1-10 of the Code of Ordinances, provides that a permit may only be denied on the basis of a specified criminal conviction that occurred "within the five year period immediately preceding the date of the filing of the

---

[182] It also appears to be the release of this information which Plaintiffs most fear will chill protected expression.

application or has spent time in jail or prison during [said] five year period." HOUSTON, TEX., CODE OF ORDINANCES § 1-10(b). Thus, the Court agrees that the Ordinance is not narrowly tailored to the extent that it requires applicants to divulge criminal convictions prior to five years before the application, convictions for crimes other than those enumerated in § 5 of the Ordinance, or time spent in jail other than time spent serving a sentence for an enumerated criminal conviction.[183] The Court therefore enjoins the City from requiring individual permit applicants to supply this overbroad information.

4. Public Disclosure of Permit Application Information Under Texas Public Information Act

A number of Plaintiffs have raised concerns that the individual permit requirement constitutes an onerous invasion of privacy because information provided in the permit applications is subject to public disclosure under the Texas Public Information Act ("TPIA"). *See* Tex. Gov't Code § 552.002(a)(1) (information is subject to public disclosure upon request if it is "information that is collected, assembled, or maintained under a law or ordinance or in connection with the transaction of official business . . . by a governmental body"). Plaintiffs contend that the requirement is therefore not narrowly tailored because the City could have drafted the Ordinance so as to exempt permit application information from disclosure under this

[183] The City may not deny a permit on the basis of arrests that did not result in convictions. *See TK's Video*, 24 F.3d at 709, 718 (upholding provision that prevents applicant with certain prior *convictions* from obtaining a permit).

Act. *See* FTU's Response [Doc. # 170], at 30-32. According to these Plaintiffs, the City could have easily spared managers and entertainers who work in sexually oriented businesses from the risks attendant to having personal information about themselves released into the public domain by expressly providing that permit applications are to remain confidential.

The Court is not persuaded that the City's failure to include a confidentiality provision in itself invalidates the permit requirement. Pursuant to § 552.101 of the Texas Government Code, information is not subject to public disclosure under the TPIA "if it is information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Thus, under the TPIA itself, this Court may decide whether to declare such information confidential.[184]

Plaintiffs have offered evidence purporting to establish that many individuals who currently work in sexually oriented businesses, especially entertainers, will not apply for permits because they fear having personal information about themselves become a matter of public record. Specifically, entertainers are afraid that, if their personal identifying information is made available to the public, they will experience unwelcome harassment from aggressive suitors and overzealous opponents of sexually oriented

---

[184] On August 19, 1997, the Court entered a preliminary injunction enjoing disclosure of application information already collected, pending the Court's final determination of this issue. *See* Preliminary Injunction Enjoining Release of Licensing Application Information [Doc. # 196].

businesses, stalking, damage to their reputations, and other dangers.[185]

The City argues that Plaintiffs' arguments regarding the entertainers' fears of having their personal information available in public records are speculative. The City further argues that entertainers working in sexually oriented businesses already voluntarily put themselves on public display and make themselves vulnerable to strangers who frequent these businesses. *See* City's Reply to FTU's Response [Doc. # 225], at 11 n. 10. However, in its Motion for Summary Judgment, the City essentially states that it would not object to the Court declaring this information confidential. *See* City's Motion [Doc. # 120], at 46 (stating that the City expresses no opinion as to whether the employees are protected by a right of privacy that

---

[185] Plaintiffs have submitted affidavits of a number of adult entertainers describing these fears. *See* Declarations in Support of Plaintiffs' Motion for Temporary Restraining Order [Docs. # 29-50].

Plaintiffs assert that as many as one-third of Houston's adult entertainers will be so afraid of making the disclosures necessary to comply with the permit requirement that they will stop working in Houston rather than apply for a permit. In support of this contention, Plaintiffs have submitted declarations by individuals who claim to have spoken with many of the City's estimated 5,000 adult entertainers. *See* Declaration of Robert Furey (estimating that 40-45% of the entertainers at his establishment will abandon work in Houston rather than comply with new requirements); Declarations of Letitia McGinley, Cheryl Thompson, and William Altes, Exhibits 4-6 in Appendix to FTU's Response [Doc. # 171]. To the extent the declarations report the fears of persons other than the affiants, the Court declines to rely on these materials in reaching the foregoing findings and conclusions; these averments are hearsay and contain impermissible speculation.

would prevent dissemination of their personal information under the TPIA).[186]

The Court is persuaded that Plaintiffs' concerns about public disclosure of the permit application information are not inconsequential. Adult entertainers may anonymously (or through stage names) put their bodies on display in front of strangers, but these actions do not imply a willingness to publicize the entertainers' personal information through which customers or other private persons may trace the entertainers to their homes or otherwise invade their privacy without permission. The fact that an entertainer is willing to dance publicly or a manager is willing to be employed in a sexually oriented business that deals with the public, or the fact that a determined harasser or stalker might conceivably follow an entertainer home after she leaves work, does not mean that adult entertainers and managers have voluntarily sacrificed all privacy rights and need for safety protections.

The Court finds that there is meaningful potential danger to individuals working in sexually oriented businesses if the information in their permit applications is disclosed to the public. The Court concludes further that

---

[186] It is not clear what the City's current position is on this issue. In a later brief, the City contends that neither it nor this Court would be able to declare information contained in the individual permit applications to be confidential in such a way as to avoid the requirements of the TPIA. *See* City's Reply to FTU's Response [Doc. # 225], at 13 & n. 13. In contrast, the legislative record indicates that members of the City Council's Sexually Oriented Business Committee wanted to make the application forms confidential, but they were advised that the City did not have the power to restrict public access to this information. *See, e.g.*, Minutes for October 11, 1996, Committee Meeting, Exhibit 11A to City's Motion [Doc. # 120], at 4.

the potential for disclosure is likely to have a chilling effect on the applicants' protected speech.[187] These dangerous and chilling effects are sufficiently severe that the information should be held confidential by the City.

In addition, some Plaintiffs are also concerned about having this personal information in the hands of City officials. *See* A.H.D.'s Reply [Doc. # 264], at 19-20 n. 3. However, because the law of this Circuit now allows cities to collect personal information about individuals working in sexually oriented businesses, *see TK's Video,* 24 F.3d at 709-10, this issue is beyond reach; Plaintiffs have no legal basis for challenging the City's possession of such information.[188]

In sum, the Court concludes that the dangers inherent in having personal information made available to the general public regarding individuals who work in a controversial and potentially dangerous setting, and whose work is entitled to some First Amendment protection, mandate a ruling that the information disclosed on adult entertainer and manager permit applications be kept confidential by the City. The Court reaches this conclusion by reference to the constitutional interests at stake in the adult entertainment setting and therefore relies on the provision of Tex. Gov't Code § 552.101 that information

---

[187] According to the City, as of November 6, 1997, only 1,352 individuals out of the City's estimated 5,000 adult entertainers had applied for permits under the Ordinance.

[188] Nevertheless, the Fifth Circuit recognized in *TK's Video,* 24 F.3d at 709-10, the possible chilling effect that can result even from collection of such information by city officials. These concerns, while insufficient to overcome the City's interest in collection of the data for law enforcement purposes, strongly suggest that such information should be withheld from dissemination to the general public.

may be exempt from disclosure under the TPIA because it is considered to be confidential under constitutional law.[189]

5. Prior Restraint

Several groups of Plaintiffs challenge the individual permit requirement as an impermissible prior restraint. In support of this argument, they argue that the permitting procedure lacks adequate procedural safeguards and challenge the required criminal background check. In addition, they argue that, even if the requirement is valid under the federal constitution, it is invalid under the broader protection of the Texas Constitution.

a. Procedural Safeguards

In support of their argument that the permit requirement is an invalid prior restraint because it lacks adequate procedural safeguards, Plaintiffs rely most heavily on *FW/PBS*. In that case, the Supreme Court struck down a sexually oriented business licensing requirement because it failed to provide a reasonable time limit on the city's decision whether to issue a license and because it failed to provide an avenue for prompt judicial review of a license denial. *See FW/PBS,* 493 U.S. at 222-231, 110 S.Ct. at 603-07.

---

[189] Because the Court reaches this decision from consideration of the likely chilling effect such disclosure would have on constitutionally protected activities, the Court is not limited to the specific statutory exceptions contained in the TPIA itself, as discussed in *Industrial Foundation of the South v. Texas Industrial Accident Board,* 540 S.W.2d 668, 681 (Tex.1976).

In particular, the A.H.D. Plaintiffs argue that the permit requirement is an impermissible prior restraint because: (i) § 28-254(c) allows as much as a ten day delay between the submission of an application and the issuance of a permit; (ii) the burden is on the applicant who has not received a response within ten days to request the issuance of a temporary permit; (iii) the ten day delay could be extended if the City mails the permit on the tenth day or if the applicant must request a temporary permit; and (iv) an individual may be denied a permit, or have a permit revoked, based on prior criminal offenses. In addition, the A.H.D. Plaintiffs contend that the Ordinance does not meet other necessary, but unspecified, procedural safeguards. *See* A.H.D.'s Response [Doc. # 173], at 43-45.

The FTU Plaintiffs challenge the ten day application processing delay, the lack of a requirement that the City provide notice of its decision on the same day that it makes the decision, and the lack of a requirement that the City must go to court to justify a denial of a permit. *See* FTU's Response [Doc. # 170], at 34-49.

The Dee & Dee Plaintiffs challenge the ten day application processing delay and the criminal background check and also advance several somewhat different reasons for their contention that the permit requirement is an impermissible prior restraint. *See* Dee & Dee's Response [Doc. # 178], at 45-47, 57-58. They argue that the application process is invalid because the Ordinance: (i) provides no remedy if the City refuses to issue or deny a permit; (ii) provides no remedy if the City refuses to issue a requested temporary permit; (iii) provides no remedy if the City refuses to issue or deny a permit and thus requires all applicants to proceed through the appellate process; (iv) does not allow an applicant to obtain a temporary permit

while appealing an adverse decision denying her permit application; and (v) does not maintain the status quo pending issuance of a permit.

In *TK's Video,* the Fifth Circuit held that "[c]ontent-neutral regulations contain adequate procedural safeguards when (1) any prior restraint before judicial review of the licensing process is for a specified brief period during which the status quo is maintained; and (2) there is prompt judicial review after denial of a license." 24 F.3d at 707-08 (citing *FW/PBS,* 493 U.S. 215, 110 S.Ct. 596, 107 L.Ed.2d 603). In addition to these two elements, the FTU and A.H.D. Plaintiffs urge the Court to recognize one other procedural requirement for the City's licensing of individual employees. Specifically, they contend that, under *Freedman v. State of Maryland,* 380 U.S. 51, 58, 85 S.Ct. 734, 13 L.Ed.2d 649 (1965), and *Southeastern Promotions, Ltd. v. Conrad,* 420 U.S. 546, 560, 95 S.Ct. 1239, 43 L.Ed.2d 448 (1975), the City should bear the burden of going to court to justify permit denials for individual applicants. The Court will consider Plaintiffs' arguments regarding procedural safeguards in the context of these three factors.

i. Application Processing Period

With respect to the period of time the Ordinance allows the City to process an application, Plaintiffs argue that a ten day delay is excessive and thus renders the permit requirement an impermissible prior restraint.[190] In

[190] In its summary judgment motion, the City indicates that "[i]n most cases, the application process can take less than 10 days, and often as little as 2 or 3 days." City's Motion for Summary Judgment

(Continued on following page)

support of this argument, Plaintiffs cite *Kev, Inc. v. Kitsap County,* 793 F.2d 1053, 1060 (9th Cir.1986), in which the Ninth Circuit found that a five day processing period for a similar type of application was unreasonable and thus unconstitutional.

Notwithstanding the Ninth Circuit's opinion on the matter, this Court is bound by a contrary rule established by the Fifth Circuit. In *TK's Video,* the Fifth Circuit upheld a *sixty* day processing period for operator *and* employee license applications. The court found this period to allow a reasonable amount of time for the county to complete such procedures as reviewing applications, performing background checks, and making identification cards. *See TK's Video,* 24 F.3d at 708. In light of that decision, this Court holds that, as a matter of law, the ten day processing period allowed by Ordinance 97-75 is constitutionally adequate.[191] Given the budget constraints and vagaries of administrative processing by a large municipality with thousands of employees, a ten day

---

[Doc. # 120], at 55. In determining the validity of the processing period, the Court may not rely on this promise. As the Fifth Circuit explained in *TK's Video,* 24 F.3d at 708, "[i]t is no answer that the [governmental entity] has not elected to do [something that is permitted under the ordinance]. . . . Businesses engaged in activity protected by the First Amendment are entitled to more than the grace of the State."

[191] The Dee & Dee and FTU Plaintiffs attempt to distinguish *TK's Video* on the factual ground that the Fifth Circuit upheld a much longer processing period there because that period applied to processing of licenses for businesses, rather than for individual employees. The Court is not persuaded by this argument. As noted above in the text, the Fifth Circuit expressly stated that the sixty day period upheld in *TK's Video* applied to *both* business and individual employee applications, thus allowing a period six times longer than the Houston Ordinance allows for processing individual permit applications. *See* 24 F.3d at 708.

period is not an excessive amount of time to allow the City to reach decisions on permit applications.[192]

For the same reason, the Court finds no constitutional infirmity in the further delays that may arise if the City mails a permit on the tenth day or if an applicant does not receive the permit shortly after ten days have elapsed and must request a temporary permit.[193] Even with these

---

[192] In addition, the legislative record contains justification for the City's enacting a processing period of more than a day or two. In particular, the City's Legal Department discussed with the City Council's Sexually Oriented Business Committee some of the reasons delays might occur in processing individual applications. *See, e.g.*, Minutes for October 11, 1996, Committee Meeting, Exhibit 11A to City's Motion [Doc. # 120], at 10; Minutes for October 30, 1996, Committee Meeting, Exhibit 13B to City's Motion, at 17.

The Dee & Dee Plaintiffs argue that the question of whether the ten day period is reasonable is a factual issue and that summary judgment is inappropriate here because the City has not put forward its justification for needing that period of time. Further, these Plaintiffs argue that the City's statement that applications could often be processed in as little as two to three days constitutes a concession that ten days is unreasonable. Although the Court agrees generally with Plaintiffs that the issue of whether a city actually needs a given period of time to process license applications is a factual issue, in light of the Fifth Circuit's determination in *TK's Video* that a sixty day period is not unreasonable, the Court concludes that the reasonableness of the ten day period does not create a genuine issue of *material* fact precluding summary judgment here. The Court must defer to the City of Houston's judgment that a ten day period is necessary to allow for the unusual case where processing is complicated.

[193] The Court rejects the FTU Plaintiffs' wishful assertion that the permit processing for entertainers and managers must be "for the *shortest* fixed period compatible with sound administrative decision making." FTU's Response [Doc. # 170], at 36 (emphasis added). This alleged requirement is not supported by the case law. Instead, *FW/PBS* and *TK's Video* provide that the processing period must merely be reasonable. *See FW/PBS*, 493 U.S. at 228, 110 S.Ct. 596 ("the license for a First Amendment-protected business must be issued within a reasonable period of time").

delays, the Ordinance provides a procedure in which applicants should receive their licenses well within the amount of time that was sanctioned in *TK's Video.*[194]

The A.H.D. and FTU Plaintiffs further contend that an applicant who does not receive a permit within roughly ten days should not have the burden of requesting a temporary permit. The FTU Plaintiffs suggest that a far less restrictive alternative would be one that automatically temporarily exempts an employee from the permit requirement who has not received notice of a ruling ten days after submitting an application. In support of this suggestion, they cite *Redner v. Dean,* 29 F.3d 1495, 1501-03 (11th Cir.1994), in which the Eleventh Circuit invalidated a licensing procedure for sexually oriented business establishments that did not mandate that an applicant be permitted to begin operating if it had not received a decision within the promised time period.

---

[194] The FTU Plaintiffs have offered evidence that some applicants did not receive their licenses until weeks after the promised ten day deadline. *See* Declaration of Manager Cheryl Thompson, Exhibit 6 of Appendix to FTU's Response [Doc. # 171], ¶ 13 (received decision 16 days after 10th day); Declaration of Dancer Ann Marie Hasselbach, Exhibit 10 of Appendix to FTU's Response, ¶ 9 (received decision more than one month after 10th day). Although Plaintiffs argue that these extended waiting periods "illustrate the dangers inherent in a system which requires speech rights to be restrained while one awaits the vagaries of delivery from the U.S. mail," FTU's Response [Doc. # 170], at 47, and thus are indicative of what future applicants can expect even after the Ordinance goes into effect, these few apparent administrative errors do not invalidate the entire application process. Due to the current standstill, the City has not yet begun enforcing the Ordinance, and these individuals have suffered no harm nor infringement of the First Amendment rights. Thus, the Court finds no probative value in the proffered declarations.

The Court is not persuaded by Plaintiffs' argument. Under *Ward*, 491 U.S. at 799, 109 S.Ct. 2746, the City is not required to adopt the "least restrictive means" of achieving its governmental purpose. *In addition, in contrast* to the ordinance in *Redner*, § 28-254(f) of Ordinance 97-75 provides for *mandatory* issuance of a temporary permit if the City fails to grant a permit within ten days or if the City (after initial denial of an application) fails to provide a hearing within ten days of the applicant's request. Finally, pursuant to § 28-254(f), the temporary permit shall be issued "immediately" upon written request of the applicant. Plaintiffs therefore have failed to persuade the Court that there is any real danger that the City will surpass the processing period sanctioned in *TK's Video*.

Thus, the Court finds no constitutional infirmity in the Ordinance's provisions regarding application processing.

ii. Prompt Judicial Review

As noted above, the A.H.D. and Dee & Dee Plaintiffs also argue that the Ordinance does not meet the constitutional requirements for prompt judicial review of the licensing decisions.

The A.H.D. Plaintiffs do not explain the specific basis for their objection. The Court sees no constitutional difficulty with the judicial review process provided by the Ordinance, which allows an unsuccessful applicant to have a prompt hearing before a hearing officer within ten days of the denial and requires that the applicant receive a notice of the right to seek an injunction or judicial review of the decision. *See* § 28-254(e).

The Court also concludes that this provision satisfies the concerns raised by the Dee & Dee Plaintiffs that the City may simply refuse to issue or deny a permit or issue a requested temporary permit. In such an unlikely case, an applicant has the right, under other applicable law, to seek an injunction or mandamus forcing the City to act.[196]

The Dee & Dee Plaintiffs also argue that the Ordinance's permit requirement for individuals is invalid because it does not allow an applicant to obtain a temporary permit while appealing a permit denial and because it does not maintain the status quo pending the issuance of a permit. Although Plaintiffs are correct that the City must maintain the status quo during the permit application process, *see TK's Video,* 24 F.3d at 708-09, their arguments do not render the permit requirement itself invalid, *see id.* at 725. The Court simply holds that the City, in order to comply with *TK's Video,* may enforce the permit requirement so long as a manager or entertainer who is working at a sexually oriented business immediately before the permit requirement goes into effect is allowed to continue working, whether or not a temporary permit is obtained, pending the processing of her or his permit application and pending any appeal of a permit denial; in contrast, the City is not required to allow a manager or entertainer who has *not* been working in a sexually oriented business immediately before the requirement goes into effect to commence such work until a permit is actually issued.

---

[196] As for the Dee & Dee Plaintiffs' concern that the City may simply refuse to act and require all applicants to proceed solely through the appellate process, there is no evidence that the City has thus far adopted such an approach. Therefore, no Plaintiff has standing to raise this argument.

iii. Burden on City to Justify Permit Denials in Court

Finally, the FTU and A.H.D. Plaintiffs contend that, for purposes of the individual permit requirement, the burden should be on the City to institute judicial proceedings to justify a denial of a permit, rather than on the individual managers and entertainers. Plaintiffs acknowledge that the two requirements addressed above, namely a reasonably brief application processing period and prompt judicial review, constitute the only procedural safeguards that are required under *FW/PBS* and *TK's Video* for municipal licensing of sexually oriented *businesses.* However, they contend that the rationale behind the Supreme Court's decision in *FW/PBS* not to adopt this third factor, which was used by the Supreme Court in *Freedman,* 380 U.S. at 58, 85 S.Ct. 734, and *Southeastern Promotions,* 420 U.S. at 560, 95 S.Ct. 1239, should not apply in the context of licensing for *individuals. See* FTU's Response [Doc. # 170], at 35 & n. 15.

These Plaintiffs claim that, in *FW/PBS,* the Supreme Court dispensed with the requirement that the government must have the burden to go to court to justify license denials for sexually oriented business establishments because a business establishment that is denied a license would have sufficient motivation and wherewithal to initiate its own judicial review. In contrast, Plaintiffs urge, individual managers and entertainers who are denied permits would have much less incentive and economic ability than business establishments to initiate judicial proceedings and would be more likely simply to abandon their line or work or move on to another city.

The Court is not persuaded. Although in *FW/PBS* the Supreme Court did give some consideration to the degree of incentive an unsuccessful applicant would have to seek judicial review of a permit denial, the Supreme Court's primary justification for shifting the burden away from the City was the fact that the City's decision of whether to issue a permit was merely a ministerial action based on a review of the general qualifications of each license applicant. *See* 493 U.S. at 229-30, 110 S.Ct. 596. Likewise, in the case at bar, the issuance of an individual permit is a ministerial action that does not require the City to "exercise discretion by passing judgment on the content of any protected speech." *Id.* Therefore, the Court holds that there is no constitutional infirmity in the fact that Ordinance 97-75 assigns to unsuccessful applicants the burden of challenging permit denials in court.

b. Criminal Background Check

Plaintiffs also argue that the provisions of Ordinance 97-75 that allow the City to deny or revoke a permit for an applicant who has committed certain criminal offenses during the prior five years is an impermissible prior restraint. In support of this contention, they cite *Near v. State of Minnesota,* 283 U.S. 697, 51 S.Ct. 625, 75 L.Ed. 1357 (1931), in which the Supreme Court held that prior criminal speech violations could not justify a prospective injunction which would directly restrain future speech activities; *Vance v. Universal Amusement Co., Inc.,* 445 U.S. 308, 100 S.Ct. 1156, 63 L.Ed.2d 413 (1980); *Fernandes v. Limmer,* 663 F.2d 619, 629 (5th Cir.1981) ("[p]ersons with prior records are not First Amendment outcasts"); *International Soc. For Krishna Consciousness of Atlanta v. Eaves,* 601 F.2d 809, 833 (5th Cir.1979); *City of Seattle v.*

Bittner, 81 Wash.2d 747, 505 P.2d 126, 131 (Wa.1973); and *DCR Entertainment, Inc. v. Pierce County,* 55 Wash.App. 505, 778 P.2d 1060 (Wa.App.1989) (adult entertainers could not be denied the right to continue engaging in protected expression simply because they have "abused that freedom in the past").

This Court is bound, however, by more recent Fifth Circuit authority, which has upheld licensing of adult entertainers that includes criminal background checks. *See TK's Video,* 24 F.3d at 709. Therefore, the Court rejects Plaintiffs' claim that a criminal background check is an impermissible prerequisite to obtaining an individual permit to work in a sexually oriented business.[196]

c. Texas Constitution

The FTU Plaintiffs contend that, even if the Ordinance's individual permit provisions are valid under the federal constitution, they are nevertheless invalid under the Texas Constitution because Article 1, Section 8 of the Texas Constitution provides greater protection for speech than the federal constitution. *See Ex parte Tucci,* 859

---

[196] The FTU Plaintiffs also argue briefly that some of the criminal record criteria are unconstitutional. *See* FTU's Response [Doc. # 170], at 3-4. However, no Plaintiff has shown standing to challenge these criteria. In *FW/PBS,* the Supreme Court expressly declined to reach the merits of a similar challenge precisely because the plaintiffs failed to show they had the requisite standing. *See* 493 U.S. at 234, 110 S.Ct. 596 (in order to have standing to challenge such provisions, an individual must show "(1) a conviction of one or more of the enumerated crimes. And (2) that the conviction or release from confinement occurred recently enough to disable the applicant under the ordinance"). This Court is therefore likewise precluded from addressing these concerns.

S.W.2d at 7; *Davenport,* 834 S.W.2d at 8-9. The Court rejects this argument.

In *Woodall,* the Fifth Circuit affirmed the district court's determination that the broader free speech rights recognized by the Texas Supreme Court under the Texas Constitution than have been recognized under the federal constitution do not apply to municipal land use restrictions on sexually oriented businesses. *See* 49 F.3d at 1127-28. However, in that case, the Fifth Circuit noted that the district court determined that the greater protections under the Texas Constitution *do* apply to prior restraints. *See id.* at 1127. Thus, according to Plaintiffs, the Fifth Circuit has implicitly recognized that provisions regarding license applications connected with sexually oriented businesses may be held to a higher standard of scrutiny under the Texas Constitution than under the federal constitution. This Court disagrees. Although it briefly mentioned this statement by the district court that heightened state constitutional protection may apply to prior restraints, the Fifth Circuit in *Woodall* expressed no opinion on this particular conclusion, and the issue was not even presented for decision by the Fifth Circuit.

In any event, the district court's conclusion regarding the Texas Constitution and prior restraints on adult entertainment appears to be at odds with the only Texas appellate authorities on the subject. The Texas Courts of Appeal have rejected outright the proposition that adult entertainment is entitled to any more protection from the Texas Constitution than from the federal constitution. *See Schleuter,* 947 S.W.2d at 926 ("Article I, section 8 provides broader rights of free speech than the First Amendment. But, Article I, section 8 does not extend those broader rights to topless dancing") (citing *Davenport,* 834 S.W.2d at

8; *2300, Inc. v. City of Arlington, Texas,* 888 S.W.2d 123, 127 (Tex.App. – Fort Worth 1994, no writ)). The Court will follow these relevant Texas state cases and rejects Plaintiffs' attempt to read more meaning than is warranted into undeveloped dicta by the Fifth Circuit in *Woodall.*[197]

6. "As Applied" Challenge

Various Plaintiffs also challenge the individual permit requirement on the ground that the City has applied it in a discriminatory fashion. For instance, the FTU Plaintiffs claim that the City specifically chose to accept permit applications in person only between the hours of 8:00 a.m. and 12:00 p.m. three days a week for the purpose of harassing and intimidating permit applicants, since the City should know that adult entertainers and managers work late-night hours. In addition, Plaintiffs claim that applications are accepted only in a dangerous and deserted neighborhood (one block away from the federal courthouse), that entertainers were videotaped as they filled out their permit applications, and that one entertainer was not allowed to bring her young child with her when she filled out her application. *See* FTU's Response [Doc. # 170], at 64-65.

---

[197] The Court does not find abstention to be warranted on this issue which presents a relatively clear issue of state constitutional law. According to the Fifth Circuit, "[t]he only time that a state constitutional provision may warrant abstention is when that constitutional provision is so interrelated with the statute or ordinance at issue that it can be said state law is ambiguous." *Louisiana Debating,* 42 F.3d at 1492. *See also* abstention discussion *supra* in Section V.B.1.

The Court is not persuaded that Plaintiffs' complaints about the permit application process rise to the magnitude of a constitutional violation.

However, the Court is concerned about the possible chilling effect that may result from the videotaping of individuals applying for permits. The Ordinance itself does not authorize the Houston Police Department to make these videotapes, and nothing in the legislative record for the Ordinance suggests a justification for such action. The Court therefore seriously questions the City's decision to make these videotapes.

7. Conspicuous Display Requirement

In the event that the Court upholds the permit requirement for individual managers and entertainers, Plaintiffs seek a declaration invalidating the Ordinance's requirement that entertainers conspicuously wear personal identification cards while performing. Plaintiffs argue that requiring entertainers to wear identification cards while working violates the entertainers' right to privacy and anonymity. *See* FTU's Response [Doc. # 170], at 68-76; A.H.D.'s Response [Doc. # 173], at 46-47. Plaintiffs also assert that this requirement is unconstitutional because it directly interferes with the entertainers' expressive activity, is not necessary for any valid municipal purpose, and is intended instead merely to harass and intimidate adult entertainers. Plaintiffs claim that the City's stated interest could be equally well achieved by requiring licensed entertainers to keep identification cards on site at the premises where they are working and available for display to police officers upon request. Plaintiffs fear that the conspicuous display requirement will

have an impermissible chilling effect on entertainers, especially because it may allow unwanted suitors, harassers, or stalkers an even easier opportunity to track down personal information on individual entertainers than if the information were merely kept in City records. Finally, Plaintiffs argue that the City provided no justification whatsoever in the Ordinance for the conspicuous display requirement.

In response, the City argues that in *TK's Video* the Fifth Circuit upheld a requirement that employees of adult businesses wear identification cards while at work. However, it is not clear whether this display requirement was challenged before the Fifth Circuit because the court's opinion does not specifically address this issue. In any event, the plaintiffs in *TK's Video* were adult video stores and bookstores, not enterprises that featured live erotic dancers. Thus, the Fifth Circuit certainly did not consider the question of whether such a requirement would be permissible as applied to erotic dancers.

This Court agrees with Plaintiffs that the conspicuous identification card display requirement for adult entertainers contained in Ordinance 97-75 is an overly intrusive invasion of privacy, unjustified by the legislative record. In enacting this requirement, the City Council set forth no specific justification whatsoever. When the Committee members discussed this requirement, they simply indicated to the City's Legal Department that they wished to impose it on entertainers, without explanation for its rationale.[198] The Houston Police Department recommended

---

[198] *See, e.g.*, Transcript of August 19, 1996, Committee Meeting, Exhibit 7G to City's Motion [Doc. # 120], at 17 (Council member Castillo indicated that "I think we ought to find some mechanism where a

(Continued on following page)

to the Committee that "[o]wners, managers and employees of a S.O.B. shall have their license immediately available while at work," but this recommendation did not specify that entertainers should have to *wear* their licenses while performing.[199]

The City appears to suggest that the justification for this requirement is that it would help police officers identify entertainers they want to arrest. However, the legislative record contains no evidence that police officers have had any difficulty in making these identifications.[200]

---

license is actually required to be held by the dancer while he or she is engaged in the employment"); Minutes for October 11, 1996, Committee Meeting, Exhibit 11A to City's Motion, at 6-7.

[199] Memorandum from Sam Nuchia, Chief of Police, to Helen Huey, Exhibit 9C to City's Motion, at 2.

[200] At one Committee meeting, Assistant District Attorney Don Smith informed the Houston City Council members that the rationale for the Harris County conspicuous display requirement was that "[t]his does away with the . . . problem [of] the unknown dancer, when the officer doesn't want to make the arrest at the time they observe the incident." Transcript of August 19, 1996, Committee Meeting, Exhibit 7G to City's Motion [Doc. # 120], at 33. Beyond this conclusory statement that such a problem may hypothetically exist, the legislative record for Ordinance 97-75 contains no evidence whatsoever that police officers in Houston or Harris County actually have any problem in identifying entertainers whom they would like to arrest. In fact, when Co-Chair Boney followed upon Smith's explanation by asking whether Smith had any comments on the enforcement of Houston's current ordinance, Smith solely discussed the problems police officers have in getting juries to convict entertainers and patrons for public lewdness.

Harris County's most recent sexually oriented business ordinance also requires entertainers to wear identification cards while performing. This provision has been preliminarily enjoined by Judge Vanessa Gilmore pending resolution of a similar constitutional challenge. *See Riva Corp. v. Harris County, Texas*, No. H-96-3277 (S.D.Tex. March 18, 1997).

The only other rationale for the conspicuous display requirement mentioned even in passing in the legislative record is the police department's recommendation that, if entertainers working in adult enterprises were wearing identification cards, then patrons who had complaints about specific entertainers could more easily report them to an establishment's management or to the police. *See* Transcript of September 16, 1996, Committee Meeting, Exhibit 9D to City's Motion [Doc. # 120], at 30. However, the record contains no evidence of any specific incidents in which a patron was unable to report a complaint for lack of ability to identify an entertainer.

Because the City has shown no legislative justification for imposing the burden of the conspicuous display requirement on adult entertainers engaged in protected activities, rather than merely requiring that entertainers keep their licenses somewhere on the premises where they could easily and quickly retrieve them, the Court is obligated to review this requirement as a content-based restriction on speech. Accordingly, the Court strikes it down under strict scrutiny.[201]

---

[201] The Court's conclusion here is further supported by its concerns regarding the chilling effect the conspicuous display requirement would likely have an [sic] adult entertainers. The Court's concern is well expressed in a recent Tenth Circuit opinion that struck down a similar requirement, albeit in the context of political speech. In *American Constitutional Law Foundation, Inc. v. Meyer,* 120 F.3d 1092 (10th Cir.1997), *cert. granted,* 522 U.S. 1107, 118 S.Ct. 1033, 140 L.Ed.2d 100 (1998), the court invalidated a statute that required initiative and referendum petition circulators to wear identification badges while seeking petition signatures, explaining that:

> Information contained on an identification badge is much more accessible than information attached to a filed petition and, unlike the affidavit requirement, the badge requirement forces

(Continued on following page)

Since it does not appear that Plaintiffs are challenging the conspicuous display requirement for *managers,* the Court does not reach this issue.

H. *No-Touch and Three-Foot Rules*

Finally, Plaintiffs challenge two provisions of Ordinance 97-75 that regulate the conduct of adult entertainers: § 28-258(a), which prohibits touching between patrons and adult entertainers (the "no-touch rule"),[202] and § 28-258(b), which establishes a three-foot buffer zone between patrons and adult entertainers (the "three-foot rule").[203]

> circulators to reveal their identities at the same time they deliver their political message. The badge requirement operates when the reaction to their message may be the most intense, emotional, and unreasoned. Thus, as opposed to the affidavit requirement, the badge requirement deprives circulators of their anonymity at the precise moment their interest in anonymity is greatest. The record amply supports the court's finding that the badge requirement chills circulation.

Id. at 1102. In striking down this conspicuous display requirement, the Tenth Circuit rejected arguments that "the badges enable the state to pursue more efficiently individuals who engage in misconduct," noting that "'the First Amendment does not permit the State to sacrifice speech for efficiency.'" *Id.* at 1102-03 (quoting *Riley v. National Federation of the Blind of North Carolina, Inc.,* 487 U.S. 781, 795, 108 S.Ct. 2667, 101 L.Ed.2d 669 (1988)).

[202] Section 28-258(a) provides that: "[i]t shall be unlawful for any entertainer to touch a customer or the clothing of a customer while engaging in entertainment or while exposing any specified anatomical areas or engaging in any specified sexual activities." Not all Plaintiffs are challenging the Ordinance's "no-touch" rule. *See, e.g.,* FTU's Response [Doc. # 170], at 2.

[203] Section 28-258(b) provides that: "[i]t shall be unlawful for any entertainer to approach closer than three (3) feet to any customer while

(Continued on following page)

Plaintiffs contend that these provisions are invalid because they are content-based restrictions on speech and because they are not narrowly tailored to serve the City's asserted interest in reducing criminal activity within adult enterprises. They also argue that the three-foot rule interferes with expressive conduct and is vague and therefore subject to arbitrary enforcement. For the reasons discussed below, the Court upholds both of these provisions.

1. Content-Based or Content-Neutral?

Plaintiffs primarily argue that the no-touch rule and especially the three-foot rule are invalid content-based regulations because the City enacted them with the predominate purpose of severely restricting expressive activity rather than of addressing any negative secondary effects that may be caused by this type of speech. In addition, the FTU Plaintiffs argue that the three-foot rule must be struck down as an impermissible infringement on speech because enforcement of the rule will economically devastate their businesses.

a. Legislative Justification for these Requirements

Once again, in order to determine whether a regulation contained in Ordinance 97-75 is content-based or content-neutral, and thus what standard of scrutiny should apply to it, the Court must consider whether the City has justified the regulation by specific reference to evidence in the legislative record upon which a reasonable

---

engaging in entertainment or while exposing any specified anatomical areas or engaging in any specified sexual activities."

City Council member could have relied in determining that the regulation would address negative secondary effects caused by the adult entertainment. *See supra* Section III.A.3. The Court concludes that the record contains ample justification for both the no-touch rule and the three-foot rule and therefore reviews them as content-neutral regulations under intermediate scrutiny.

In its deliberations, the City Council's Sexually Oriented Business Committee received testimony from Houston police officers and statistical evidence from the Houston Police Department Vice Division indicating the frequency of arrests and convictions made for crimes committed inside adult enterprises. *See* Sexually Oriented Business Statistics Amended, Exhibit 21 to City's Motion [Doc. # 120]. According to Lieutenant Smith, these arrests were primarily for the offense of public lewdness committed by erotic entertainers. Lieutenant Smith testified that lewdness occurs when an entertainer touches a patron and that therefore this crime could be prevented if entertainers were prohibited from touching patrons. *See* Minutes for June 17, 1996, Committee Meeting, Exhibit 2C to City's Motion [Doc. # 120], at 8; Minutes for July 22, 1996, Committee Meeting, Exhibit 4C to City's Motion, at 6-7; Minutes for October 30, 1996, Committee Meeting, Exhibit 13B to City's Motion, at 4. In addition, in order to familiarize Council members with the problem they sought to regulate, the Committee watched a video of a "table dance," a dance in which an entertainer performs in close proximity to a patron. This video was made during an undercover operation at an adult cabaret. *See id.;* "Table Dances" Video, Exhibit 41 to City's Motion.

The Committee also heard testimony about the difficulties police officers have in making arrests and

obtaining convictions for public lewdness in adult cabarets. According to this testimony, Houston police officers are currently only able to make sufficiently accurate observations to support lewdness convictions in court by participating in the lewd behavior themselves. The Committee heard testimony that it is too difficult for police officers to discern what behavior would constitute criminal lewdness from across a crowded room or even from another table in an adult cabaret and difficult, as a practical matter, to make an arrest based on such an observation. *See, e.g.,* Transcript of August 29, 1996, Committee Meeting, Exhibit 8E to City's Motion [Doc. # 120], at 89-91. Thus, the Committee was advised that a buffer zone between entertainers and patrons would make it easier for police officers to enforce the law against public lewdness by making it easier for them to see from a distance whether the law is being violated. The Committee was also advised that a buffer zone would make it possible for arrests to be made without police officers themselves taking part in any criminal activity. *See* Transcript of August 19, 1996, Committee Meeting, Exhibit 7G to City's Motion, at 61-63 (describing police officers' participation in lewd behavior during sting operation).

Based on this evidence, the Court concludes that the City has presented sufficient evidence that both the no-touch rule and the three-foot rule were enacted for the purpose of combatting negative secondary effects associated with adult entertainment, mostly the prevalence of criminal public lewdness. It will therefore review these provisions as content-neutral restrictions on speech.

b. Economic Impact

The FTU Plaintiffs also claim that the Ordinance's three-foot rule is a content-based restriction on speech because the City knew that the provision would cause severe economic hardship to the Plaintiffs' businesses. In support of this contention, Plaintiffs have submitted evidence purporting to show that the three-foot rule would force adult cabarets to remodel their premises in such a way as to allow only one-tenth as many dancers to be able to perform simultaneously as are currently able to do so. *See* Affidavit of C. Davis Wilson (architect), Attachment to FTU's Supplemental Response [Doc. # 254] (estimating that FTU Plaintiffs will have to eliminate 75-80% of the tables in their adult cabarets in order to comply with the three-foot rule) and accompanying architectural plans. Plaintiffs have also submitted declarations by several cabaret owners stating that this rule therefore will force them out of business.[204] Furthermore, these Plaintiffs claim that the City Council was aware that the rule would

---

[204] On August 18, 1997, the FTU Plaintiffs filed an Unopposed Motion for Leave to File Supplemental Response and an Emergency Motion for Consideration [Doc. # 189], requesting that the Court allow them time to consult with architectural experts and submit evidence regarding the economic impact that compliance with the three-foot rule would impose on their businesses. On October 10, 1997, the FTU Plaintiffs submitted this evidence. *See* Attachment to FTU's Supplemental Response [Doc. # 254]. On October 24, 1997, the City filed objections to this evidence [Doc. # 277] on the grounds of untimeliness and irrelevance. It was the Court's understanding that the City did not respond to the FTU Plaintiffs' August 18, 1997, Motion for Consideration because the City did not object to allowing these Plaintiffs some additional time to submit this evidence. Because the evidence was submitted in time for the Court to review it before ruling on the pending summary judgment motions, the FTU Plaintiffs' Motion for Leave and for Consideration [Doc. # 189] is **GRANTED**, and the City's objections [Doc. # 277] are **DENIED**.

have this effect on their businesses and that this knowledge therefore demonstrates that the Council's predominate motivation in enacting the three-foot rule was content-based suppression of speech. *See* FTU's Response [Doc. # 170], at 20, 82 n. 28 (citing evidence that City Council was expressly told that three-foot rule would reduce number of dancers who could simultaneously perform in one facility from fifty dancers to five or ten).

The Court is unmoved by Plaintiffs' evidence. As noted previously, "'[t]he inquiry for First Amendment purposes is not concerned with economic impact,'" *City of Renton,* 475 U.S. at 54, 106 S.Ct. 925 (quoting *American Mini Theatres,* 427 U.S. at 78, 96 S.Ct. 2440 (Powell, J., concurring)), and the Supreme Court's decision in *Turner II,* 520 U.S. 180, 117 S.Ct. 1174, 137 L.Ed.2d 369, has not altered this rule in the context of adult entertainment. *See supra* Section III.A.4. Although the Fifth Circuit has not yet addressed the issue of buffer zones between patrons and adult entertainers, another federal Court of Appeals has specifically rejected the economic arguments Plaintiffs raise here. In *DLS,* 107 F.3d at 413, the Sixth Circuit, relying on *City of Renton,* upheld a six foot buffer zone despite the plaintiffs' arguments that the buffer zone would force them to engage in expensive renovations of their premises and would reduce the entertainers' tips. *See also Kev, Inc.,* 793 F.2d at 1061 (upholding ten foot buffer zone); *DFW Vending, Inc. v. Jefferson County, Texas,* No. 97-CV-611 (E.D.Tex. Nov. 27, 1997) (upholding six foot buffer zone).

However, even if this Court were to consider Plaintiffs' economic arguments regarding the three-foot rule, Plaintiffs' proffered evidence does not demonstrate that the rule would have as significant a financial impact as Plaintiffs

claim.[205] The Court has reviewed the FTU Plaintiffs' proffered architectural plans and finds that they do not support Plaintiffs' specific arguments regarding the financial impact they claim they will suffer under the three-foot rule.

First of all, it is clear from these plans that compliance with the three-foot rule will *not* force Plaintiffs to eliminate a substantial number of tables from their cabarets. On the contrary, the plans suggest that the cabarets will need to remove few, if any, tables at all. Instead, the rule will only reduce the number of seats at which patrons may view a performance in immediate proximity to the entertainer. According to the plans, under the three-foot rule, these performances, or "table dances," may take place only in designated areas clearly marked at least three feet away from any seat. In calculating that 75-80% of the space currently available for table dances would be eliminated under the Ordinance, Plaintiffs have apparently only counted those seats that are located right at the three-foot line. A cursory review of the plans clearly indicates that patrons sitting in other nearby seats could also view table dances performed in the designated areas, albeit from slightly more than three feet away. The fact that only a relatively few patrons could sit as close to these areas as the Ordinance would allow does not render the Ordinance unduly burdensome nor does it support

---

[205] The *DLS* court did note that it would "consider the economic effects of the ordinance in the aggregate, not at the individual level; if the ordinance were intended to destroy the market for adult cabarets, it might run afoul of the First Amendment." 107 F.3d at 413.

Plaintiffs' contention that compliance with the three-foot rule would economically devastate their businesses.[206]

As already noted, federal courts have upheld buffer zones as large as six or ten feet. The fact that the Houston City Council specifically chose a smaller distance, three feet,[207] detracts from Plaintiffs' implicit argument that a performance that occurs perhaps five feet away from a patron, as opposed to three feet, cannot count as a close-proximity table dance and therefore will economically ruin their businesses. In any event, for reasons discussed *infra* at Section V.H.3., the Court rejects Plaintiffs' argument that there is any constitutional right to provide or engage in close-proximity table dances at all.

Finally, although Plaintiffs claim that compliance with the three-foot rule will significantly reduce the number of table dances that may occur simultaneously,

---

[206] Further, it is unclear to the Court why Plaintiffs contend, through the architectural plans, that seats located right next to the main performance stages should not count as seats for which close viewing of table dances is available. A substantial number of seats that have been marked as unavailable for these dances in the plans appear to be only three feet or so away from the main performance stages. Plaintiffs may not have considered these to be seats available for table dances because the stages might be elevated from the floor. However, the Ordinance does not require Plaintiffs to elevate their stages. Nor, in any event, would this distinction between the types of performances available support Plaintiffs' contention that the three-foot rule will require Plaintiffs to remodel their facilities in an economically unviable manner.

[207] The Houston Police Department recommended the enactment of a six-foot zone, *see* Transcript of September 16, 1996, Committee Meeting, Exhibit 9D to City's Motion [Doc. # 120], at 38-39; Memorandum from Sam Nuchia, Chief of Police, to Helen Huey, Exhibit 9C to City's Motion, at 2, but the Committee eventually decided upon three feet.

Plaintiffs have failed to submit any evidence indicating how many such dances typically do occur simultaneously and thus whether the three-foot rule will actually force a reduction in the number of table dances that occur in an adult cabaret on any given night. Although Plaintiffs may claim, for instance, that their current floor plans allow one hundred dancers to perform table dances simultaneously, the Court is skeptical, and has indeed received no evidence indicating, that this number of entertainers ever actually performs at the same time in any one cabaret. If Plaintiffs' argument is not that so many entertainers do perform simultaneously, but instead that the three-foot rule reduces the number of seats from which patrons may view the closest table dances allowed, then the Court sees no reason why patrons could not simply switch seats in order to view a table dance from three feet away, as opposed to, say, five feet away. In other words, the seats that are closest to the designated table dance performance areas could be reserved for patrons currently viewing, and presumably paying for, a table dance.

Thus, even if the Court were to consider the economic impact of the three-foot rule on Plaintiffs' businesses, Plaintiffs have failed to demonstrate that the rule would actually cause a severe burden. At most, it appears that Plaintiffs may have to spread their tables out somewhat more, but not nearly so much as to eliminate a significant portion of their seating area.[208]

---

[208] The Court thus rejects the FTU Plaintiffs' request to defer judgment on the issue of the three-foot rule because they have served pertinent discovery requests upon the City. *See* FTU's Response [Doc. # 170], at 80-83. The Court holds that Plaintiffs have failed to establish that the requested discovery or expected responses will raise genuine

(Continued on following page)

2. Narrowly Tailored to Serve Substantial Governmental Interests?

Since the Court has determined that the City enacted the no-touch and three-foot rules in a content-neutral manner, it must next consider, under the intermediate scrutiny test, whether these rules are narrowly tailored to serve substantial governmental interests. Plaintiffs argue that, even if these rules were enacted for the purpose of addressing negative secondary effects, they are nevertheless invalid because they are not narrowly tailored to serve the City's asserted interest. Plaintiffs raise a variety of arguments that the City could easily advance its goals with less intrusive methods. For example, the A.H.D. Plaintiffs suggest that the City could increase licensing fees for sexually oriented businesses as a means of increasing resources available to law enforcement to combat crime allegedly associated with the businesses. *See* A.H.D.'s Response [Doc. # 173], at 40. However, Plaintiffs do not explain exactly how this half-hearted suggestion could address the problems the City seeks to alleviate through these new rules.[209]

---

issues of *material* fact precluding summary judgment on this provision of the Ordinance.

[209] In fact, another set of Plaintiffs has challenged, in their Complaint, the City's decision to increase the licensing fees for sexually oriented businesses in Ordinance 97-75. *See* N.W. Enterprises' First Amended Complaint [Doc. # 84], at 19. Although the City has defended its decision to increase the license fees, *see* City's Motion [Doc. # 120], at 40-41, and City's Reply to A.H.D.'s Locational Response [Doc. # 243], at 13, it does not appear that any Plaintiffs have seriously raised this issue in their responses to the City's Motion for Summary Judgment. In any event, the Court finds that the modest fee increases contained in Ordinance 97-75 (now $475 for an enterprise permit and $29 for an individual permit) are justified by the legislative record, *see* Minutes for

(Continued on following page)

The FTU Plaintiffs argue that the three-foot rule is not sufficiently narrowly tailored because the no-touch rule renders it unnecessary. *See* FTU's Response [Doc. # 170], at 82-84. However, it is not the Court's role to consider whether the City made the best policy judgment in deciding to enact both rules. The Court may only assess whether the City's decision is supportable by evidence in the legislative record that the rules it enacted would address negative secondary effects, in this case the prevalence of criminal public lewdness. The record reveals that the Sexually Oriented Business Committee engaged in a great deal of discussion regarding whether to enact both rules. *See, e.g.,* Minutes for October 11, 1996, Committee Meeting, Exhibit 11A to City's Motion [Doc. # 120], at 7; Minutes for October 30, 1996, Committee Meeting, Exhibit 13B to City's Motion, at 3-7; Transcript of January 7, 1997, Committee Meeting, Exhibit 19D to City's Motion, at 81-93.[210] Based on testimony from police officers, the Committee concluded that the three-foot rule would provide police officers with an easier means of enforcing the no-touch

---

November 4, 1996, Committee Meeting, Exhibit 14B to City's Motion, at 11 (discussing fact that fees need to be raised because of increases in costs of investigation), and are thus constitutionally valid. *See TK's Video,* 24 F.3d at 710 (upholding license fees of $500 for enterprises and $50 for individuals).

[210] While there is no question that the three-foot rule is in the Ordinance as enacted by the full City Council, it is not clear how the provision was reinstated after the Committee voted on January 7, 1997, to delete this rule from the proposed Ordinance. *See* Transcript of January 7, 1997, Committee Meeting, Exhibit 19D to City's Motion [Doc. # 120], at 187-88. As mentioned earlier, the legislative record which the City has submitted does not contain any minutes or transcripts of the January 15, 1997, Council meeting in which the Ordinance was enacted.

rule.[211] The Court holds that this rationale is an adequate justification for the three-foot rule under applicable constitutional standards.

In sum, the Court rejects Plaintiffs' arguments that the no-touch and three-foot rules are not sufficiently narrowly tailored. It is well established that the City need not employ the least restrictive means of achieving its desired goals. *See Ward,* 491 U.S. at 798, 109 S.Ct. 2746; *SDJ,* 837 F.2d at 1276. Furthermore, the Fifth Circuit has specifically upheld a no-touch rule in sexually oriented businesses as narrowly tailored to serve a substantial government interest, *see Hang On,* 65 F.3d at 1254, and other federal courts have upheld even less narrowly tailored buffer zones, *see DLS,* 107 F.3d at 413 (six feet); *Kev, Inc.,* 793 F.2d at 1061 (ten feet); *DFW Vending,* No. 97-CV-621 (six feet). The Court therefore rejects Plaintiffs' contention that these new rules are not sufficiently narrowly tailored.[212]

---

[211] At one meeting, Committee Co-Chair Boney explained that:

> [T]his distance is, primarily, for enforcing a no-touch provision. . . . [I]t is not for the purpose of measuring whether someone is two feet or three feet away but, primarily, to allow the Department to have easy enforcement of no touching while the entertainer is in a state of partial nudity or entertaining. Transcript of November 20, 1996, Committee Meeting, Exhibit 15C to City's Motion for Summary Judgment [Doc. # 120], at 87.

[212] The question of whether the Ordinance's three-foot rule is narrowly tailored raises interesting similarities to the recent case of *Schenck v. Pro-Choice Network of Western New York,* 519 U.S. 357, 117 S.Ct. 855, 866-68, 137 L.Ed.2d 1 (1997), in which the Supreme Court struck down a floating buffer zone between protesters and people entering and leaving abortion clinics. On first blush, *Schenck* appears to cast doubt on the validity of the City's three-foot rule. Like the floating buffer zone in *Schenck,* the three-foot rule makes it difficult for

(Continued on following page)

3. Interference With Expressive Content

The FTU and A.H.D. Plaintiffs also contend that the three-foot rule is invalid because it impermissibly interferes with the expression of the adult entertainer by creating a separation between the entertainer and the audience. *See* FTU's Response [Doc. # 170], at 76-79, 84-94; A.H.D.'s Response [Doc. # 173], at 41. Plaintiffs argue that, because of the loud noise that is typical in adult cabarets, this buffer zone will make oral verbal communication very difficult and will destroy the possibility of a personal connection developing between an entertainer and a patron.

The FTU Plaintiffs strenuously assert several creative arguments in support of their contention that the quality of expression of erotic entertainment is itself protected by the First Amendment. For example, they urge that the

---

individuals to engage in desired speech; was enacted for the actual purpose of preventing other, more narrow behavior; may be difficult to enforce; and may burden more speech than is intended by causing individuals to remain, overcautiously, even further away from their intended listeners or observers than the rule allows, due to a lack of certainty about whether they are inside or outside the buffer zone. However, because *Schenck* involved an entirely different category of speech, political speech, which receives greater First Amendment protection than adult entertainment, this Court will follow the federal authorities that have specifically considered buffer zones in the context of topless dancing. The Court also notes two additional distinctions between these cases. In *Schenck*, the restricted speech took place on public sidewalks, which have long been noted to constitute "a prototypical example of a traditional public forum." *Id.* at 867. Also, the floating buffer zone struck down in *Schenck* was fifteen feet, a distance that the Court noted prevented "communicating a message from a normal conversational distance." *Id.* Despite Plaintiffs' concerns about the loud noise in adult cabarets, three feet is certainly "a normal conversational distance."

availability of "intimate conversation" is at the core of constitutionally protected erotic entertainment:

> One of the key elements of the expressive intimate fantasy of dancing in close-proximity is the softly spoken verbal communication between entertainer and customer. It is a critical interpersonal intimate verbal communication which cannot be replicated when the dancer is compelled to maintain a distance of three feet from her customer .... Close proximity dancing *is not simply the enhancement* of the erotic message of a dance which could take place at a greater distance from the customer. Close proximity dancing is *sui generis* .... [T]he proximity additionally serves to create a special sense of heightened theatricality that can not be achieved or created at a distance.

FTU's Response [Doc. # 170], at 77-78. In support of this argument, Plaintiffs have submitted declarations by a number of adult entertainers describing the importance of close-proximity dancing to their trade. *See* Exhibits 7-9, 11-14, and 16-21 to Appendix to FTU's Response [Doc. # 171]. Plaintiffs argue that, although not all types of artistic performances require close proximity, in adult erotic entertainment, "the medium is the message." FTU's Response [Doc. # 170], at 88. Moreover, they contend that the only other way to provide the same quality of expression in a loud and crowded cabaret environment would be to allow private entertainment in separate rooms but that this possibility is foreclosed by another provision of the Ordinance, § 28-258(c), which prohibits entertainment in enclosed areas. As a practical matter, as well, Plaintiffs contend that the three-foot rule actually requires a more burdensome separation than three feet because, in order

to ensure compliance with the three-foot rule, a prudent entertainer must actually perform four or five feet away from a patron so that her moving shoulders or arms do not accidentally stray over the three-foot "line." *See* FTU's Response [Doc. # 170], at 89 n. 34. In sum, Plaintiffs insist that the three-foot rule raises various genuine questions of material fact and urge that they be permitted to develop the issue at trial.[213]

Plaintiffs are unable to cite any case law supporting their creative arguments, but they argue that this is because no court has even considered the argument they raise here regarding the impact of a buffer zone on the expressive nature of adult entertainment. Plaintiffs insist that courts have up until now only been presented with the question of the economic impact of such buffer zones. *See, e.g., DLS,* 107 F.3d at 409-10; *Zanganeh v. Hymes,* 844 F.Supp. 1087, 1091 (D.Md.1994). This Court disagrees. Adult entertainment receives less protection than other forms of constitutionally protected speech, and the courts have consistently rejected similar arguments to the ones Plaintiffs raise here. For instance, in upholding a ten-foot buffer zone, the Ninth Circuit explained that the regulation did "not significantly burden first amendment rights. While the dancer's erotic message may be slightly less effective from ten feet, the ability to engage in the

---

[213] Plaintiffs state that, if permitted, at trial they would present expert testimony by a drama or communications expert regarding the artistic need for intimacy in successful erotic performances and by a mental health professional regarding the psychology of close-proximity entertainment. *See* FTU's Response [Doc. # 170], at 79-80 n. 027. The Court concludes there is no need for further factual development of the record on this issue. The arguments are amply illustrated by the existing evidence.

protected expression is not significantly impaired. Erotic dancers still have reasonable access to their market." *Kev, Inc.*, 793 F.2d at 1061. *See also Colacurcio v. City of Kent*, 944 F.Supp. 1470, 1476 (W.D.Wash.1996) (acknowledging that the "customer's experience is more intense, more personal, more erotic if the dancer is close," but concluding that nothing in the law suggests that "patrons are entitled under the First Amendment to the maximum erotic experience possible").[214]

In sum, this Court concludes that Plaintiffs' argument here amounts to a distinction without a difference. All of the courts that have addressed this issue have rejected the notion that close-proximity dancing is itself protected speech, no matter whether such dancing is considered *enhancement* of a particular form of expression or is instead a distinct type of expression in and of itself. Thus, under prevailing federal constitutional doctrine, the Court holds that the three-foot rule is constitutionally valid.

4. Vagueness and Arbitrary Enforcement

The A.H.D. Plaintiffs also argue that the no-touch and three-foot rules are void for vagueness because they allow for arbitrary enforcement. *See* A.H.D.'s Response [Doc.

---

[214] Plaintiffs vigorously argue that the *Colacurcio* court was not asked to consider whether a buffer zone merely fails to allow enhancement of the particular expression erotic entertainers attempt to achieve or instead actually *destroys* an entire type of expression. The Court finds Plaintiffs' distinction unavailing. In *Colacurcio*, the court noted and rejected the plaintiffs' argument that the ordinance's ten-foot rule "effectively eliminates 'table dancing,' which they contend[ed] was a unique medium of expression protected by the First Amendment." 944 F.Supp. at 1471.

173], at 41. For example, they suggest that it would be difficult for a law enforcement officer to know if an entertainer was an unacceptable 32 inches away from a patron or an acceptable 36 inches away. They also suggest that it would be unclear whether an entertainer was in violation of the three-foot rule if a customer inadvertently passed by close behind her back. These arguments have no merit.

With respect to the first scenario, a rule is not invalid merely because it might, as a practical matter, be difficult to determine compliance. This contention amounts to nothing more than an individual alleged violator's defense to a particular prosecution. As with any criminal case, the City would bear the burden of proving that a violation had occurred. With respect to the second scenario, the Fifth Circuit has already established that only intentional violations of a no-touch rule qualify as violations. *See Hang On,* 65 F.3d at 1254 (concluding that because a no-touch rule did not prescribe a culpable mental state, under Texas criminal law the rule did not criminalize "inadvertent or negligent touching"). This reasoning applies with equal force to a buffer zone requirement.

5. Texas Constitution

Finally, the FTU Plaintiffs argue that even if the three-foot and no-touch rules pass federal constitutional muster, the combined effect of these rules is not sufficiently narrowly tailored to survive the more stringent free speech test imposed by the Texas Constitution. *See* FTU's Response [Doc. # 170], at 95-108. They contend that, even though the United States Supreme Court rejected the "least restrictive means" test in *Ward,* the Texas Supreme Court has held that a government body

must employ the least restrictive means possible to achieve its goal when regulation affects protected expressive activity.[215]

As noted earlier, Plaintiffs are correct that the Texas Supreme Court has chosen to interpret the free speech guarantees of the state constitution, contained in Article I, Section 8, independently from and more broadly than the federal courts' interpretation of the First Amendment to the United States Constitution. *See, e.g., Tucci,* 859 S.W.2d at 8; *Davenport,* 834 S.W.2d at 14 n. 28; *O'Quinn v. State Bar of Texas,* 763 S.W.2d 397, 402 (Tex.1988).

However, despite Plaintiffs' vigorous arguments, this Court is not persuaded that it would be appropriate to apply a more stringent free speech analysis under the Texas Constitution than under the federal constitution in the case at bar. Since the time *Davenport* and *Tucci* were decided, the only Texas appellate courts to address this issue have declined to apply more expansive state constitutional protection to adult entertainment. For instance, in *Schleuter,* a Texas Court of Appeals explained that:

> Article I, section 8 provides broader rights of free speech than the First Amendment. But, Article I, section 8 does not extend those broader rights to topless dancing. Therefore, we will only analyze Fantasy Sports' claim under First Amendment jurisprudence.

---

[215] Again, the Court does not find abstention to be warranted on this issue which presents a relatively clear issue of state constitutional law. *See Louisiana Debating,* 42 F.3d at 1492, and abstention discussion *supra* in Section V.B.1.

947 S.W.2d at 926 (citing *2300, Inc.*, 888 S.W.2d at 127; *Tucci*, 859 S.W.2d 1; *Davenport v. Garcia*, 834 S.W.2d at 8). In *2300, Inc.*, another Texas Court of Appeals held that:

> The cases interpreting this [free speech] protection have been limited in scope and *thus far* have not included topless/exotic dancing .... [T]he trial court reasonably concluded that topless/exotic dancing probably was not contemplated as being included in the expanded protections of the Texas Constitution when Article I section 8 was drafted.

888 S.W.2d at 127. This Court will follow the lead of these Texas appellate authorities. If the Texas Supreme Court disagrees and believes that its broad interpretation of Article I, section 8 should apply to adult entertainment, then it may so rule when the issue is presented to it.

VI. *CONCLUSION*

For the reasons elaborated in detail above, it is hereby

ORDERED that the City of Houston's Motion for Summary Judgment [Doc. # 120] is **GRANTED IN PART** and **DENIED IN PART** in accordance with this Memorandum Opinion and Order. It is further

ORDERED that Plaintiffs' Cross-Motions for Summary Judgment [Docs. # 170, 173, 218, 221, 258, 268, 270, 289, and 290] are **GRANTED IN PART** and **DENIED IN PART** in accordance with this Memorandum Opinion and Order. It is further

ORDERED that Ordinance 97-75 is valid and enforceable except in the following respects. The City is hereby **PERMANENTLY ENJOINED** from enforcing the

following amendments to the HOUSTON, TEX., CODE OF ORDINANCES with respect to constitutionally protected enterprises, which include adult movie theatres, adult arcades, adult mini-theatres, adult bookstores, adult video stores, adult cabarets, adult lounges, and other establishments that feature nude or topless dancing:

(i) The amendment of § 28-125(b)(1) to increase the minimum distance between an enterprise and a protected land use from 750 to 1,500 feet;[216]

(ii) The amendment of § 28-125(b)(3) to increase the radius for calculating whether a surrounding area is residential from 1,000 to 1,500 feet; [217]

(iii) §§ 28-253 and 28-254 to the extent that they require managers and entertainers to disclose the following information on their permit applications: phone numbers; home addresses; and information regarding criminal convictions obtained prior to five years before the application, convictions for crimes other than those enumerated in § 5 of Ordinance 97-75, and time spent in jail other than time spent serving a sentence for an enumerated criminal conviction;[218] and

(iv) § 28-256 to the extent that it requires entertainers to wear personal identification cards while they are working in protected enterprises.[219]

---

[216] *See* discussion *supra* Section V.B.3.a.

[217] *See* discussion *supra* Section V.B.3.a.

[218] *See* discussion *supra* Section V.G.3.

[219] *See* discussion *supra* Section V.G.7.

It is further

ORDERED that the issue of the validity of the new formula in § 28-125(b)(3) for accounting for multifamily dwellings in the determination of whether an area is residential is **SEVERED** from the parties' current summary judgment motions. Within ten business days from entry of this Order, the City shall submit a memorandum of law on the issue of alternative avenues of communication with specific reference to the new multifamily dwelling provision of the Ordinance. The City shall also submit an affidavit by an individual with knowledge of this issue regarding how the City expects that the new formula for multifamily dwellings will affect the Plaintiffs in this action. Plaintiffs will have ten days to file a responsive memorandum and other materials they deem necessary. In their memoranda, the parties are specifically directed to indicate to the Court what factual evidence currently exists regarding the potential impact of this provision and, if this evidence is now lacking, what measures would need to be taken to produce such evidence.[220] It is further

ORDERED that all information provided by managers and entertainers in their applications for permits under §§ 28-253 and 28-254 is hereby declared **CONFIDENTIAL**. The City is **PERMANENTLY ENJOINED** from disclosing this information in response to any requests made under the Texas Public Information Act.[221] It is further

---

[220] *See* discussion *supra* Section V.B.3.c.

[221] *See* discussion *supra* Section V.G.4.

ORDERED that any manager or entertainer who is working at a protected enterprise immediately before the individual permit requirement goes into effect must be allowed to continue working, whether or not a temporary permit is obtained, pending the processing of her or his permit application and pending any appeal of a permit denial.[222] It is further

ORDERED that the issue of the validity of §§ 28-136(b) and 28-258(c) as applied to large VIP rooms in adult cabarets and lounges is **SEVERED** from the parties' current summary judgment motions. The City shall respond to Ice Embassy's "Motion for Partial Summary Judgment Determining that H.C.O. §§ 28-136(b) and 28-258(c) are Unconstitutional as Applied to Ice Embassy's Proposed 'VIP Room'" [Doc. # 258] within ten business days of entry of this Order. All Plaintiffs interested in this issue must file their replies within ten business days of receipt of the City's response.[223] It is further

ORDERED that the City must report to the Court at a pretrial conference to be held March 2, 1998, whether or not the City intends to commence enforcement of § 28-130(g), which extends the Ordinance's previous signage restrictions to sexually oriented businesses located in multi-unit commercial centers, without complying with Tex.Loc. Gov't Code § 216.001 *et seq.* This issue is also **SEVERED** from the parties' current summary judgment motions and shall be addressed by the Court as necessary in light of the City's current intent concerning enforcement of § 28-130(g). Interested Plaintiffs are granted leave to

---

[222] *See* discussion *supra* Section V.G.5.a.ii.

[223] *See* discussion *supra* Section V.E.3.

amend their Complaints to include this state statutory claim. The Court will deem all Plaintiffs asserting such a claim to have raised the issue and to be governed by the foregoing ruling. The City will be required to file answers to any such Amended Complaints. If the City seeks to enforce § 28-130(g) without complying with Tex.Loc. Gov't Code § 216.001 *et seq.*, the City will be required to file a motion for summary judgment setting forth the applicable law and facts that mandate such result. The Court will establish the briefing schedule for this issue, if necessary, at the conference on March 2, 1998.[224]

The Court also makes the following evidentiary and procedural rulings. It is

ORDERED that FTU's Motion for Reconsideration [Doc. # 138] is DENIED.[225] It is further

ORDERED that FTU's Objections to City's Evidence [Doc. # 166] are **OVERRULED**.[226] It is further

ORDERED that Dee & Dee's Motion to Strike [Doc. # 168] is **DENIED**.[227] It is further

ORDERED that A.H.D.'s Objections to City's Evidence [Doc. # 174] are **OVERRULED**.[228] It is further

ORDERED that FTU's Unopposed Motion for Leave to File Supplemental Response and Emergency Motion for Consideration [Doc. # 189] is **GRANTED**.[229] It is further

---

[224] *See* discussion *supra* Section V.F.4.

[225] *See* discussion *supra* note 125.

[226] *See* discussion *supra* Section IV.

[227] *See* discussion *supra* Section IV.

[228] *See* discussion *supra* Section IV.

ORDERED that Dee & Dee's Motion to File Two Hours Late [Doc. # 213] is **GRANTED**.[230] It is further

ORDERED that the City's Motion to Strike Plaintiffs' Arguments regarding Tex.Loc. Gov't Code § 216 [Doc. # 225] is **DENIED**.[231] It is further

ORDERED that the City's Motion to Strike Jane Doe Plaintiffs [Doc. # 229] is **DENIED**.[232] It is further

ORDERED that the City's Objections to A.H.D. Plaintiffs' Evidence in Support of their Cross-Motion for Summary Judgment [Doc. # 232] are **OVERRULED**.[233] It is further

ORDERED that the City's Motion to Strike the Language "And Others Similarly Situated" from Chil Soung Plaintiffs' Case Style Heading [Doc. # 233] is **GRANTED**.[234] It is further

ORDERED that the City's Motions to Strike Non-Locational Briefing [contained in Docs. # 234, 235, 236, 243 and 244] are **DENIED**.[235] It is further

ORDERED that the City's Motion to Strike FTU Plaintiffs' Exhibits [Doc. # 245] is **DENIED**.[236] It is further

---

[229] *See* discussion *supra* note 204.

[230] *See* discussion *supra* note 3.

[231] *See* discussion *supra* Section V.F.4.

[232] *See* discussion *supra* note 7.

[233] *See* discussion *supra* note 119.

[234] *See* discussion *supra* note 11.

[235] *See* discussion *supra* note 84.

[236] *See* discussion *supra* note 125.

ORDERED that the City's Motion to Strike N.W. Plaintiffs' Affidavit of Steve Collins [Doc. # 246] is **DENIED.**[237] It is further

ORDERED that FTU's Motion to Strike the Affidavit of Ollie Schiller [Doc. # 247] is **DENIED.**[238] It is further

ORDERED that FTU's Motion to Strike the City's Affidavit of Steve Andrews [Doc. # 252] is **DENIED.**[239] It is further

ORDERED that FTU's Motion to Strike the City's Stipulation Regarding Certain Matters and Documents [Doc. # 253] is **DENIED.**[240] It is further

ORDERED that Ice Embassy's Motion for Leave to File Supplemental Complaint [Doc. # 255] is **GRANTED.**[241] It is further

ORDERED that N.W. Enterprises' Motion to Strike the City's Affidavit of Steve Andrews [Doc. 266] is **DENIED.**[242] It is further

ORDERED that the FTU Plaintiffs' Conditional Motion for Injunction Pending Abstention [Doc. # 272] is **DENIED.**[243] It is further

---

[237] *See* discussion *supra* note 148.

[238] *See* discussion *supra* note 152.

[239] *See* discussion *supra* note 125.

[240] *See* discussion *supra* note 71.

[241] *See* discussion *supra* Section V.E.2.

[242] *See* discussion *supra* note 125.

[243] *See* discussion *supra* note 87.

ORDERED that the City's Objections to the FTU's Affidavit of C. Davis Wilson [Doc. # 277] are **OVERRULED.**[244] It is further

ORDERED that the City's Objections to Ice Embassy's Affidavits, contained in the City's Response to Ice Embassy's Motion for Leave [Doc. # 278], are **OVERRULED.**[245] It is further

ORDERED that KQ Investments' Motion for Leave to File Complaint in Intervention [Doc. # 280] is **GRANTED.**[246] It is further

ORDERED that the City's Objection to the N.W. Enterprises' Affidavits, contained in the City's Response to N.W. Enterprises' Cross-Motion [Doc. # 302] is **OVERRULED.**[247] It is further

ORDERED that FTU's Objection to the City's Memorandum in Opposition to Abstention [Doc. # 326] is **OVERRULED.**[248] It is further

ORDERED that all requests for further discovery are at this time **DENIED.**

---

[244] *See* discussion *supra* note 204.

[245] *See* discussion *supra* note 142.

[246] *See* discussion *supra* note 12.

[247] *See* discussion *supra* note 148.

[248] *See* discussion *supra* note 86.